TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1925

No. [redacted] 34

THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, AND MUNICH REINSURANCE COMPANY, APPELLANTS,

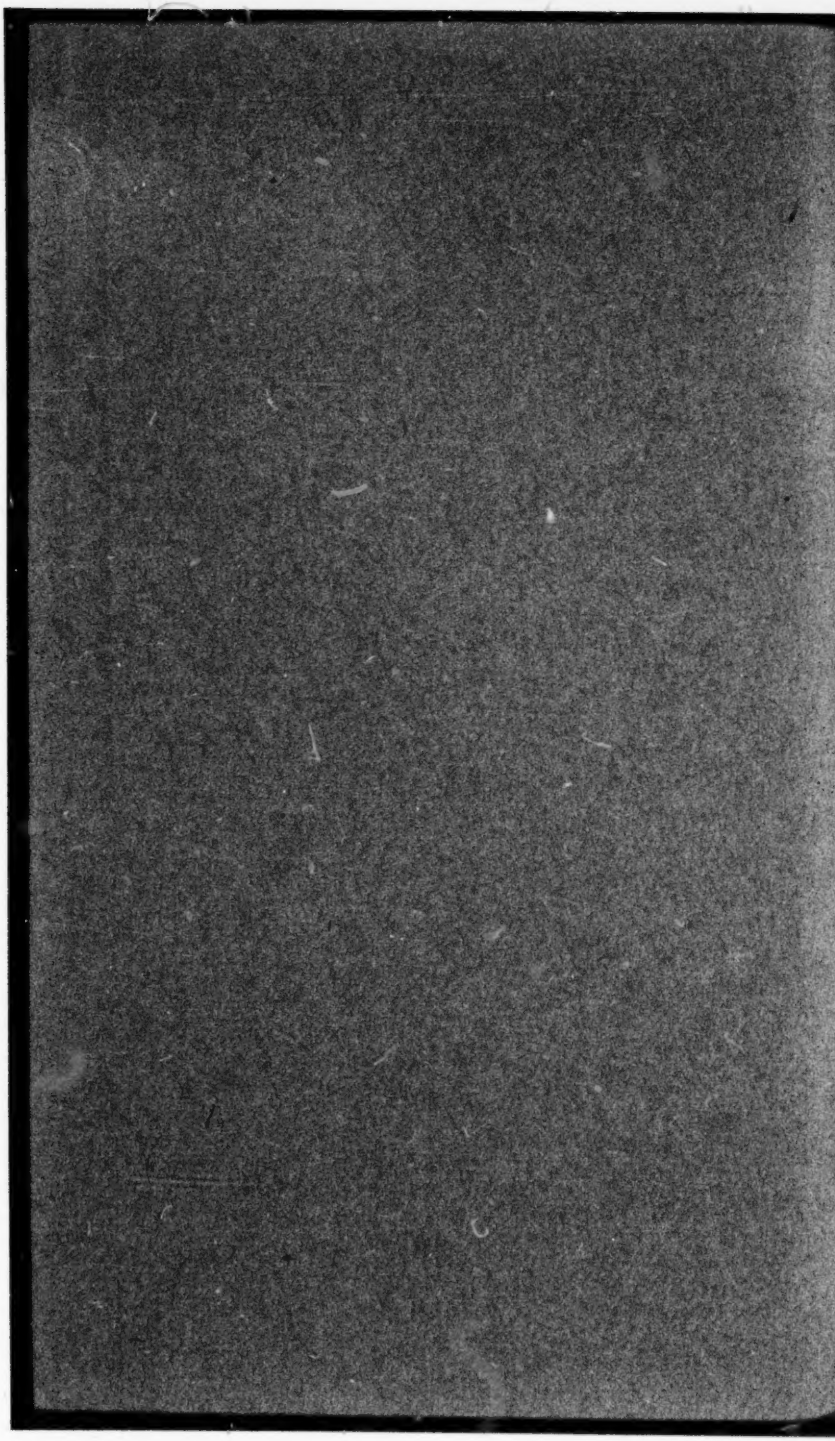
vs.

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK, ET AL., ETC.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED FEBRUARY 25, 1926

(26,126)



(30,126)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 816

THOMAS W. MILLER, ALIEN PROPERTY CUSTODIAN, AND MUNICH REINSURANCE COMPANY, APPELLANTS,

vs.

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APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 24, 1924

UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, Virginia, on the first Tuesday in November, being the sixth day of the same month, in the year of our Lord one thousand nine hundred and twenty-three.

Present: Hon. Charles A. Woods, Circuit Judge; Hon. Edmund Waddill, Jr., Circuit Judge; Hon. Henry C. McDowell, District Judge.

Among other were the following proceedings, to-wit:

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants,

versus

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

Be it remembered that heretofore, to-wit, on February 15, 1923, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals here, which is as follows:

TRANSCRIPT OF RECORD

Filed Feb. 15, 1923.

UNITED STATES OF AMERICA,
District of Maryland, to-wit:

At a District Court of the United States for the District of Maryland, begun and held at the City of Baltimore on the first Tuesday in December (being the 5th day of the same month) in the year of our Lord, one thousand nine hundred and twenty-two.

Present: The Honorable John C. Rose, Judge Maryland District; Amos W. W. Woodcock, Esq., Attorney; William W. Stockham, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to-wit:

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Surety Company,
versus
Thomas W. Miller, Alien Property Custodian and Munich Reinsurance Com[illegible]

No. 201 Equity.

BILL OF COMPLAINT.

(2) Filed 12th June, 1920.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, a corporation,
vs.
Munich Reinsurance Company, a corporation, and Francis F. Garven, Alien Property Custodian, Defendants.

BILL OF COMPLAINT.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of United Surety Company, by virtue of an appointment by the Circuit Court of Baltimore City, by leave of Court first had and obtained, bring this their Bill of Complaint against the Munich Reinsurance Company,a corporation of the Kingdom of Bavaria, in the Empire of Germany, and Francis F. Garven, Alien Property Custodian.

And your Orators complaining show:

1. That the United Surety Company was at all times hereinafter referred to and still is a corporation of the State of Maryland, duly organized and existing and authorized by its charter to carry on the business, among other things, of writing fidelity, surety and burglary bonds and policies, which said business said United Surety Company did actively engage in from the time of its organization in the year 1906, until the appointment (3) of your Orators as receivers thereof, as hereinafter mentioned.

2. That on the 13th day of January, in the year 1911, upon a Bill of Complaint filed by Thomas H. Bowles et al., stockholders of said United Surety Company and upon the answer of said United Surety Company, your orators, Poe, Janney and Clark, were appointed Receivers of said United Surety Company by order of the Circuit Court of Baltimore City, a Court of the State of Maryland, having equity jurisdiction, and having full and ample powers and jurisdiction in the premises, and upon the 8th day of April, 1913, your Orator, J. Kemp Bartlett, was duly appointed by said Circuit Court of Baltimore City a co-receiver of said United Surety Company with the aforesaid Poe, Janney and Clark, and all of your said Orators have duly and properly qualified as Receivers of said corporation, and are now the duly constituted Receivers thereof, and your Orators file herewith certified copies of the orders appointing them as such

receivers, marked "ORATORS' EXHIBIT—RECEIVERS' APPOINTMENT", which your Orators pray may be taken as a part of this Bill of Complaint, the same as if herein incorporated in full.

3. That the Munich Reinsurance Company is a corporation of the Kingdom of Bavaria, in the Empire of Germany, with which the United States is and has been since April 6, 1917, at war, and prior to the existence of said war said Munich Reinsurance Company transacted in the United States a business of reinsuring risks accepted by insurance, bonding, surety and fidelity companies, doing business in the State of Maryland and else-
(4) where in the United States.

4. That the defendant, Francis F. Garven, is a resident of the City of Washington, in the District of Columbia, and is Alien Property Custodian, and under provisions of the Act of Congress known as the "Trading with the Enemy Act", approved October 6, 1917, large sums of money and other valuable property belonging to the said Munich Reinsurance Company have heretofore been paid, conveyed, transferred and assigned to the said Alien Property Custodian in conformity with and in pursuance of said Act of Congress, and such moneys and properties are in excess of your Orators' hereinafter mentioned claims against the same and against the said Munich Reinsurance Company and are more in value than will suffice to pay out and satisfy said claims.

5. That upon the completion of its organization in 1906 the United Surety Company entered into a certain contract with the Munich Reinsurance Company, then legally and properly doing business within the United States, wherein and whereby the United Surety Company, among other things, agreed to cede to the Munich Reinsurance Company, and the Munich Reinsurance Company agreed to accept a one-third share of the amount insured or renewed under every bond, policy or guarantee which should be issued by the United Surety Company in the territory of the United States for indemnification against loss under the three classes of insurance known as surety, fidelity and burglary insurance; the liability

assumed by the Munich Reinsurance Company under such agreement being one-half of the liability retained by the United Surety Company for its own account in each and every case; and the said contract was executed in Baltimore by the United Surety Company on the 20th day of March, 1906, and was executed in Munich by the (5) Munich Reinsurance Company on the 10th day of April in the said year 1906, a copy thereof is herewith filed marked "Orators' Exhibit—Reinsurance Agreement", which your Orators pray may be taken as a part of this Bill of Complaint the same as if herein incorporated in full.

6. That beginning early in the year 1906 the United Surety Company, from its offices in Baltimore City, in the State of Maryland, conducted and carried on the business, consisting of the three classes of insurance known as surety, fidelity and burglary insurance, but the Munich Reinsurance Company refused to be bound by the terms of said Agreement of Participation, and on or about the first day of November, 1906, wrote and sent to the said United Surety Company a letter notifying said United Surety Company that it rescinded the said participation agreement in all its phases from the beginning, and refused to be bound thereby, and said Munich Reinsurance Company did on the 29th day of May, 1907, bring its Bill of Complaint in the Circuit Court of Baltimore City against said United Surety Company, praying, among other things, that said Court should pass a decree declaring the said Participation Contract null and void and cancelling the same, and that the said United Surety Company, its agents, attorneys, and officers might by the writ of injunction be enjoined from prosecuting any suit against said Munich Reinsurance Company based upon said contract.

7. That said United Surety Company answered the said Bill of Complaint and filed its Cross Bill thereto, in which it denied the right of said Munich Reinsurance Company to rescind said agreement of participation, and prayed for an accounting of the amount due said United Surety Company from said Munich Reinsurance Com- (6) pany according to the terms of said Agreement.

8. That testimony was taken in support of the positions of the respective corporations, and it was finally adjudicated and decreed by the Maryland Court that the Bill of Complaint filed by the Munich Reinsurance Company should be dismissed, and that the cross bill filed by the United Surety Company should be retained, and an accounting had between the parties to said litigation, as prayed in said cross bill, which said adjudication of the Maryland Court was affirmed on appeal by the Court of Appeals of Maryland. A copy of the printed record of said proceedings is herewith filed, marked "Orators' Exhibit—Record No. 1", and is prayed to be taken as a part hereof, the same as if herein set forth in full.

9. That thereafter, to-wit, on or about the 19th day of November, in the year 1910, the said Munich Reinsurance Company and said United Surety Company entered into an agreement for the purpose of facilitating the accounting directed to be had by the decree hereinabove referred to, and appointed the American Audit Company their agent to examine the record, books and accounts of the United Surety Company, and therefrom to state an account in annual periods, beginning on the 2nd day of January, 1906, and ending on the 1st day of January, 1911, applying to the share of the Munich Reinsurance Company in the business of the United Surety Company in accordance with the terms of their contract, and upon said accounting a decree of the Circuit Court of Baltimore City was had on the 2nd day of January, 1913, wherein and whereby it was Adjudged, Ordered and Decreed that the sum of $154,339.28 was payable to the United Surety Company by the Munich Reinsurance Company on April 1, 1911, of which amount $11,651.88 was the final indebtedness, and $142,706.40 was payable (7) to said United Surety Company subject to a further accounting, as provided for in the Participation Agreement.

10. That said Munich Reinsurance Company appealed said cause from the Circuit Court of Baltimore City to the Court of Appeals of Maryland, which said Court of Appeals of Maryland did on the 26th day of June, 1913, affirm in part and reverse in part said decree, and directed that the account be re-stated, in accordance with that

opinion, and pursuant to that opinion the Circuit Court of Baltimore City did on the 30th day of September, 1913, pass its decree, adjudging and decreeing that there was due the United Surety Company from the Munich Reinsurance Company the sum of $77,445.79, which sum was paid by said Munich Reinsurance Company to your Orators on October 2, 1913, and your Orators file herewith a printed copy of the record in the litigation, hereinabove referred to, marked "Orators' Exhibit—Record No. 2", which it prays may be taken as a part hereof, the same, as if herein set forth in full, and a copy of the opinion of the Court of Appeals of Maryland, directing the accounting hereinabove referred to, is also herewith filed, marked "Orators' Exhibit—Opinion of Court of Appeals of Maryland", and is prayed to be taken as a part hereof the same as if herein set forth in full.

11. That the aforesaid participation agreement provided, by Article 12 thereof, as follows:

"This agreement shall take effect as of the 2nd day of January, 1906, and shall continue for a period of five years from said date, and shall be tacitly renewed for further periods of five years thereafter, unless written notice of a desire to terminate same may be given by registered letter from either party one year previous to the expiration of any term of five years. The Munich (8) has, however, the right to withdraw after the expiration of the first period of five years from this agreement at the end of any calendar year, by giving one year's notice in writing if the transactions under this agreement result in a loss to the Munich. The Munich continuing to participate in all insurance coming within the terms of this agreement granted or reneweed by the United during the currency of any notice of cancelment, and remaining liable for its share of claims arising out of such insurances, and out of insurance in force at the time of the notice being given, until the expiration of the liability thereon."

12 That Article 8 of said Participation Agreement provides the form of the annual accounting to be had between the two companies for the ascertainment of the profit or loss, if any, resulting from the business in which

they mutally shared, as aforesaid. Said Article 8 is as follows:

ARTICLE VIII.

The "United" will render to the "Munich" within two months after the close of each year a detailed account, and such account shall include all income and disbursements in accordance with the books of the "United", and shall be specific on the following items:

Income.

1. Gross premiums.

2. Reserve for unadjusted claims at the end of the previous year (See previous year's accounts).

3. Reserve for unexpired risks at the end of the previous year (See previous year's accounts).

4. Interest received, excluding 4-1/2% interest on the capital stock.

Disbursements.

1. Return premiums and rebates.

2. Reinsurance premiums.

3. Claims paid, less salvage and reinsurance in other companies.

4. Commissions and brokerage allowed.

5. Salaries, fees and all other charges of officers, clerks, agents and other employees.

6. Taxes, license and insurance department fees.

7. Rental of offices and all other disbursements, item-
(9) ized as follows:

(a) Advertising expenses.

(b) Printing and stationery.

(c) Legal expenses.

(d) Miscellaneous expenses.

8. Premium reserve for unexpired risks.

9. Reserve for claims.

The above shall only include expenses incident to the surety, fidelity and burglary insurance business.

And in Article 9 of said Participation Agreement, it is provided that if the account provided for in Article 8 shows a profit, the Munich shall receive one-third thereof as its share under the terms of this account. If the said account should show loss the Munich shall pay one-third of said loss to the United.

13. That Article 13 of the said Participation Agreement is as follows:

ARTICLE XIII.

It is especially agreed that in case notice of termination is given by either party under this agreement, the "Munich" shall receive as reimbursement for good-will five per cent (5%) of its share of the net premiums, i. e., premiums less cancelments, of the last five years previous to the expiration of the notice of termination of this agreement.

In case of notice of termination by either party, the accounts shall be made up not later than two years after the expiration of the notice. Such account shall not be charged with any premium reserve. If claims are still outstanding, the proper reserve shall be charged, and after the final settlement of each of such claims, the "Munich" will be paid any difference in its favor, and pay any difference in favor of the "United."

14. That the Munich Reinsurance Company, prior to the first day of January, 1910, gave notice to the United

Surety Company of its desire to terminate said agree-
(10) ment after the expiration of the first period of five years, so that said Participation Agreement was terminated under the terms of Article 12 thereof as of the first day of January, 1911. And the accounting which was the subject matter of the litigation between the parties was as of January 1, 1911, and did not extend to a determination of the ultimate liability of either company to the other on account of developments in the business written during the term of the contract but not yet closed.

15. That as appears from the Participation Agreement the termination of the agreement did not establish the ultimate rights of the parties as of that date, but the United Surety Company was by said agreement to continue to manage all business in force, that was shared in its inception, and after such business was closed, the respective liabilities of the United Surety Company and Munich Reinsurance Company were to be ascertained by further accounting between the parties.

16. That the ultimate liability of the said Munich Reinsurance Company under the terms of said agreement has now been determined from an Auditor's Account duly filed in the Circuit Court of Baltimore City in the case therein pending and hereinabove referred to, wherein your Orators were appointed Receivers of the said United Surety Company, wherein and whereby the liability of the United Surety Company on the policies and bonds participated in by the Munich is established, and your Orators will produce when required a copy of said Auditor's Account, the original of which is on file in the Circuit Court of Baltimore City, and in addition to the amounts for which the Munich Reinsurance Company is liable on account of the losses sustained or liability in-
curred on bonds and policies covered by the terms of (11) said contract between the two said corporations, there are many items of expense incurred in connection with auditing and adjusting claims on certain of said bonds, for one-third of which said items the said Munich Reinsurance Company is liable to your Orators, and there are further amounts of premiums for which the Munich has received credit in prior accountings between the two said corporations, but which were not collected

but were charged off as return premiums, and for their proportionate part of which the Munich should now be charged, and your Orators file herewith a true statement from the books of your Orators, showing a correct account of the sums now due and owing by the Munich Reinsurance Company to the Receivers of the United Surety Company and all of the items thereof in detail, which said statement of account is marked "Orators' Exhibit—Statement of Account", and which they pray may be taken as a part of this Bill of Complaint the same as if herein incorporated in full.

17. That on or about the 11th day of June, 1920, your Orators, pursuant to Section 9 of said "Trading with the Enemy Act", filed with said Alien Property Custodian notice of its said claim under oath in duplicate, and in the form and containing the particulars required by the said Alien Property Custodian.

And your Orators have made no application to the President of the United States to order the payment, conveyance, transfer, assignment or delivery to your Orators of any of the said money or other property so held by the Alien Property Custodian, or of any interest therein.

18. That the said Munich Reinsurance Company was incorporated as aforesaid by the Kingdom of Bavaria, in the Empire of Germany, but has never filed with the Insurance Commissioner of the State of Maryland its power (12) of attorney appointing a citizen of this State, resident within the State, an agent or attorney for the said Company, upon whom process could be served, and said company did not in any way comply with the requirements of Section 181 of Article 26 of the Annotated Code of Maryland, and there is within the State of Maryland no Manager, Director or Officer of said Munich Reinsurance Company, or agent or other person upon whom process may be served, but your Orators are informed that the principal office of said Munich Reinsurance Company within the United States is located in the City of Hartford, in the State of Connecticut, from which office it formerly transacted its business and exercised the franchise of the said Munich Reinsurance Company within the United States, and that Henry L. Thomas,

residing in the City of Hartford, is the Acting Manager of said Munich Reinsurance Company within the United States.

19. That neither the said Munich Reinsurance Company nor said Francis F. Garven, Alien Property Custodian, are within the District of Maryland.

TO THE END THEREFORE:

1. That a decree may be passed by this Honorable Court against said Munich Reinsurance Company for the amount of indebtedness to your Orators as aforesaid, and that payment thereof may be directed to be made by said decree from the moneys and other property of said Munich Reinsurance Company that have been paid, transferred, conveyed, assigned and delivered to the said defendant, Francis F. Garven, Alien Property Custodian, and now held by him.

2. That the money and other property of the said
(13) Munich Reinsurance Company held as aforesaid by the said Alien Property Custodian may be retained in the custody of the said Alien Property Custodian until final decree may be entered herein for the payment of the claim of your Orators as aforesaid.

3. That your Orators may have such other and further relief as their case may require.

MAY IT PLEASE YOUR HONOR to grant unto your Orators the writs of subpoena directed to the said defendants, the Munich Reinsurance Company, a corporation, with its principal office within the United States in the City of Hartford, in the State of Connecticut, and Francis F. Garven, Alien Property Custodian, a resident of the City of Washington, in the District of Columbia, commanding them and each of them upon a day certain therein to be named, to be and appear in this Honorable Court, to answer the premises, and to abide by and perform such decree or decrees as may be passed herein.

AND MAY IT PLEASE YOUR HONOR to pass an order, directing the said Francis F. Garven, Alien Prop-

erty Custodian, and the said Munich Reinsurance Company, to appear, plead, answer or demur in this cause upon a day certain to be designated and also directing that said order may be served on Henry L. Thomas, Action Manager of said foreign department of said Munich Reinsurance Company, wherever he may be found, and also on the said Francis F. Garven, Alien Property Custodian, wherever he may be found.

JOSEPH C. FRANCE
J. KEMP BARTLETT
STUART S. JANNEY
Solicitors for Complainants.

EDWIN W. POE,
STUART S. JANNEY,
ERNEST J. CLARK,
J. KEMP BARTLETT,
Receivers of United
Surety Company.

(14)

STATE OF MARYLAND,
City of Baltimore, to-wit:

I HEREBY CERTIFY that on this 23rd day of April, 1920, before me, the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore aforesaid, personally appeared Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, and made oath in due form of law that the matters and facts contained in the foregoing Bill of Complaint are true to the best of their knowledge and belief.

WITNESS my hand and notarial seal.

CHARLES B. HOFFMAN,
Notary Public.

(Seal)

(15) **ORDER TO PLEAD.**

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, a corporation,

vs.

Munich Reinsurance Company, a corporation, and Francis F. Garven, Alien Property Custodian, Defendants.

Upon the Bill and affidavit thereto, filed in the above entitled cause, it is this 12 day of June, 1920.

ORDERED by the District Court of the United States for the District of Maryland, In Equity, that the above named defendants, Munich Reinsurance Company, a corporation, and Francis F. Garven, Alien Property Custodian, be and they are hereby directed to appear, plead, answer or demur in this suit on or before the 10 day of July, 1920, and it is further hereby directed that a copy of this order be served on Henry L. Thomas, Acting Manager of the said Munich Reinsurance Company, in the City of Hartford and State of Connecticut, or wherever he may be found, and also upon the said Francis F. Garven, Alien Property Custodian, in the City of Washington, in the District of Columbia, or wherever he may be found, provided such service of this order be made as herein directed on or before the 19 day of June, 1920.

JOHN C. ROSE,
U. S. District Judge.

ORATOR'S EXHIBIT REINSURANCE AGREEMENT.

(16) Filed 12th June, 1920.

COPY of CONTRACT

between

UNITED SURETY COMPANY

and

MUNICH RE-INSURANCE COMPANY

(Executed in duplicate)

MEMORANDUM OF AGREEMENT

Between the UNITED SURETY COMPANY, a corporation duly incorporated under Special Act of the Maryland Legislature, with its Home Office in the City of Baltimore, hereinafter called the *"United"*, and the MUNICH RE-INSURANCE COMPANY, a corporation duly incorporated in Munich with the consent of the Royal Bavarian Government, hereinafter called the *"Munich."*

IN CONSIDERATION OF their respective covenants and agreements hereinafter made, the two said companies do hereby agree together as follows:—

ARTICLE I.

The "United" agrees to cede to the "Munich", and the "Munich" agrees to accept, a one-third (1/3) share of the amount insured or renewed under every bond, policy or guarantee which shall be issued by the "United" in the Territory of the United States, for indemnification against loss under the three classes of insurance known as surety, fidelity and burglary insurance, it being understood that the liability assumed by the "Munich" shall be one-half (1/2) of the liability

retained by the "United" for its own account in each and every case.

Should the "United" decide at any time during the currency of this Agreement to carry on any casualty or other business, it is agreed that the "United" will offer to the "Munich" a participation in such business under the term of this Agreement and the "Munich" has the (17) right to accept or refuse the participation in such business.

Should the "Munich" elect not to participate in such business, the income and proper charges connected with that business shall not be an item of the account with the "Munich."

ARTICLE II.

The proportionate liability of the "Munich" for its share on account of the business written as aforesaid by the "United" shall commence simultaneously, and shall co-exist with that of the "United."

ARTICLE III.

A memorandum of the business transacted by the "United" showing the amount of premiums, additions, cancellations, rebates and return premiums received, booked or allowed by the "United" shall be rendered to the "Munich" monthly within 30 days after the necessary particulars have been received by the "United" in accordance with the records of the Home Office and the reports of the different general agencies of the "United", which said memorandum shall be a true and accurate copy of the books of the "United."

ARTICLE IV.

The conditions of and liability upon all bonds or policies written by the "United" during the term of this Agreement and included within the purview hereof, shall be equally binding upon the "Munich" and the "United." The copies of all standard forms of bonds or policies issued and to be issued by the "United", except forms prescribed by Statute, are annexed to this Agree- (18) ment, but it is understood that the "United" shall

have the right to issue bonds or policies of a different form, if it shall so elect, and such bonds or policies shall be likewise binding upon the "Munich" and copies of such bonds or policies shall be furnished to the "Munish" on request.

ARTICLE V.

The "United" shall charge the "Munich", and the "Munich" shall be liable for the original commissions and brokerage paid by the "United" or chargeable against it by its general state or sub-agents, brokers, and the "Munich" further agrees that it shall be charged with one-third (1/3) of all management and office expenses connected with the business included under this contract, such expenses not to include, however, payments made for real estate and for the maintenance and care of real estate, fixtures and furniture, but to include and embrace a *pro rata* charge of a rental of TEN THOUSAND ($10,000.00) DOLLARS, per annum for the offices of the "United."

The "United" will furnish to the "Munich" a monthly statement showing separately and specifically—

(a) Commissions allowed agents and brokers.

(b) Management and office expenses.

It will also itemize upon request such statements, in accordance with the books of the "United", and forward the same to the "Munich."

ARTICLE VI.

All claims exceeding two thousand five hundred dollars ($2,500) shall be advised to the "Munich" with (19) full particular as per copy of the claim register of the "United"; other claims shall be advised monthly in a summary form as per copy agreed upon.

The "Munich" shall also be advised of all claims settled by monthly list, showing payment to the assured and cost of settlement, as per annexed form.

All settlement of claims whether by payment, compromise or otherwise, shall be unconditionally binding on the "Munich." In the same way shall the "Munich"

be credited with its share of any recovery or reimbursement which may be made.

ARTICLE VII.

The "United" will place at the disposal of the "Munich" all original papers referring to its business, and the "Munich" shall, through any of its officers, from time to time, check the reports received with the books and papers at the offices of the "United."

ARTICLE VIII.

The "United" will render to the "Munich" within two months after the close of each year a detailed account, and such account shall include all income and disbursements in accordance with the books of the "United", and shall be specific on the following items:—

INCOME.

1. Gross premiums.

2. Reserve for unadjusted claims at the end of previous year. (See previous year's account.)

3. Reserve for unexpired risks at the end of the previous year. (See previous year's account.)

4. Interest received, excluding 4-1/2% interest on the capital stock.

(20)

DISBURSEMENTS

1. Return premiums and rebates.

2. Re-insurance premiums.

3. Claims paid, less salvage and reinsurance in other companies.

4. Commission and brokerage allowed.

5. Salaries, fees, and all other charges of officers, clerks, agents and other employees.

6. Taxes, license and insurance department fees.

7. Rental of offices and all other disbursements.

Itemized as follows:

(a) Advertising expenses.

(b) Printing and stationery.

(c) Legal expenses.

(d) Miscellaneous expenses.

8. Premium reserved for unexpired risks.

9. Reserve for claims.

The above account shall only include expenses incident to the surety, fidelity and burglary insurance business.

ARTICLE IX.

If the account provided for in the preceding article shows a profit, the "Munich" shall receive one-third (1/3) thereof as its share under the terms of this agreement. If the said account shall show a loss, the "Munich" will pay one-third (1/3) of said loss to the "United."

The account shall be examined within one month after its receipt and any balance due by either party shall be paid, immediately upon receipt of confirmation, by New York draft or its equivalent.

Together with the account the "Munich" shall receive a certified copy of the annual statement filed by the "United" with the Insurance Commissioner of the State of Maryland.

ARTICLE X.

When any difference arises between the contracting (21) parties with reference to any part of this agreement or the obligations of the parties hereto, either party

shall have the right to have the same referred to a Board of Arbitration. Upon such request being made in writing each party shall appoint an arbitrator within thirty (30) days from the date of said request, and said two arbitrators are authorized and empowered to appoint a third. The arbitrators thus appointed shall be selected from among the Executive Officers of Insurance or Surety Companies. Said arbitrators shall meet in the City of New York unless they agree to meet in Baltimore, and the decision of the majority of the arbitrators so appointed shall be final and binding upon the parties to this agreement. If either party shall fail to appoint its arbitrator within thirty (30) days after the receipt or giving of notice to appoint the same, the arbitrator appointed by the other party shall have full authority and be clothed with full power to arbitrate any difference between the parties hereto, and his decision shall be final and binding. This agreement shall be interpreted by the arbitrators rather as an honorable engagement than a merely legal obligation.

ARTICLE XI.

This agreement may be altered in any of its terms and conditions by an endorsement thereto signed and sealed by the contracting parties.

ARTICLE XII.

This agreement shall take effect as of the second (2nd) day of January, 1906, and shall continue for a period of (22) five (5) years from said date, and shall stand as tacitly renewed for further periods of five (5) years thereafter, unless written notice of a desire to terminate the same be given by registered letter from either party one year previous to the expiration of any term of five (5) years. The "Munich" has however the right to withdraw after the expiration of the first period of five years from this Agreement at the end of any calendar year by giving one (1) year's notice in writing, if the transactions under this Agreement result in a loss of the "Munich."—The "Munich" continuing to participate in all insurances coming within the terms of this Agreement granted or renewed by the "United" during the currency of any notice of cancelment and remaining liable for its share of the claims arising out of such insurances

and out of insurance in force at the time of the notice being given until expiration of the liability thereon.

ARTICLE XIII.

It is especially agreed that in case notice of termination is given by either party under this Agreement the "Munich" shall receive as reimbursement for good will five per cent (5%) of its share of the net premiums, i. e., premiums less cancelments, of the last five years previous to the expiration of the notice of termination of this Agreement.

In case of notice of termination by either party the accounts shall be made up not later than two years after the expiration of the notice. Such account shall not be charged with any Premium Reserve. If claim are still outstanding the proper reserve shall be charged, and (23) after the final settlement of each of such claims, the "Munich" will be paid any difference in its favor and pay any difference in favor of the "United."

ARTICLE XIV.

C. Schreiner, Manager of the "Munich's" Foreign Department, is hereby acknowledged as fully empowered to act for the "Munich" with regard to all transactions which may take place under the terms of this Agreement.

MADE IN DUPLICATE, SIGNED AND SEALED in Munich, this tenth day of April, 1906.

(Seal) Munchener Ruckuersicherungs Gesellschaft.

M. R. C. (Sgd.) Szelinski. (Sgd.) ppa. Bernhardt.

and in Baltimore, this twentieth day of March, 1906, signed by its President and attested by the Secretary and the corporate seal of the Company.

UNITED SURETY COMPANY,
By (Sgd.) OLIN BRYAN,
(Seal) President.

United Surety Co.
Attest—Robert A. Dobbin, Jr., Sec'y.

The ink changes were made by consent of both parties.

(Sgd.) OLIN BRYAN.

(Initialled) Szl. Bt.

PETITION TO INSTITUTE PROCEEDINGS AGAINST ALIEN PROPERTY CUSTODIAN AND ORDER OF COURT THEREON.

(24) Filed 12th June, 1920.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Barlett, Receivers of the United Surety Company,

vs.

Francis P. Garven, Alien Property Custodian, and Munich Reinsurance Company.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The Petition of Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of United Surety Company, respectfully shows:

1. That as Receivers of said United Surety Company they have a claim against the Munich Reinsurance Company, an alien enemy corporation, the assets of which company has been taken into the possession of the Alien Property Custodian.

2. That they have been duly authorized by the Circuit Court of Baltimore City, having jurisdiction of the receivership, to institute proceedings against said Alien Property Custodian for the recovery of the amount due them out of the assets of said Munich Reinsurance Company.

WHEREFORE your petitioners pray this Honorable Court to pass its order, authorizing them to institute such proceedings in the District Court of the United States for the District of Maryland.

And as in duty bound, etc.

EDWIN W. POE,
STUART S. JANNEY.

JOSEPH C. FRANCE,
J. KEMP BARTLETT,
STUART S. JANNEY,
Solicitors for Petitioners.
(5)

ERNEST J. CLARK,
J. KEMP BARTLETT,
Receivers of United Surety Co.

Subscribed and sworn to before me this 22 day of April, 1920, by Stuart S. Janney, one of the Receivers.

CHARLES B. HOFFMAN,
(Notary's Seal) Notary Public.

Leave granted as prayed this 12 day of June, 1920.

JOHN C. ROSE,
U. S. District Judge.

IN THE CIRCUIT COURT OF BALTIMORE CITY.

Thomas H. Bowles et al.

vs.

United Surety Company et al.

Upon the petition of the Receivers herein, it is this (26) 23rd day of April, 1920, by the Circuit Court of Baltimore City, ORDERED that Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, be and they are hereby authorized and directed to institute, in the District Court of the United States for the District of Mary-

land, or elsewhere, in their discretion, against the Alien Property Custodian and the Munich Reinsurance Company, such proceedings, by a Bill in Equity, or otherwise, as in their judgment may be meet and proper for the collection of the amount due from the Munich Reinsurance Company to said Receivers.

CHAS. W. HEUISLER.

STATE OF MARYLAND,
City of Baltimore, ss:

I, CHARLES R. WHITEFORD, Clerk of the Circuit Court of Baltimore City do hereby certify that the above is a true copy of the original order of Court now on file in this office in the cause therein entitled as above.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said CIRCUIT COURT, this 23rd day of April, A. D. 1920.

CHAS. R. WHITEFORD,
Clerk.

(Seal of Court)

ORDER OF COURT EXTENDING TIME FOR ALIEN PROPERTY CUSTODIAN TO FILE ANSWER.

(27) Filed 29th June, 1920.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Edwin W. Poe, et al.,

vs.

Munich Re-insurance Company and Francis P. Garvan, Alien Property Custodian.

Upon agreement of counsel it is this 29 day of June, 1920, ordered by the United States District Court for the District of Maryland, that the time for filing of answer in

the above entitled cause be, and the same is hereby extended to August 1, 1920.

JOHN C. ROSE,
District Judge.

ANSWER OF FRANCIS P. GARVAN, ALIEN PROPERTY CUSTODIAN TO BILL OF COMPLAINT.

(28) Filed 29th July, 1920.

Now comes Francis P. Garvan, and for answer to said bill:

FIRST: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "1" of the bill.

SECOND: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph "2" of the bill.

THIRD: Admits the allegations of the third paragraph of the bill.

FOURTH: Answering the fourth paragraph of said (29) bill, this defendant says that the moneys and properties belonging to the said Munich Reinsurance Company now in the possession of the Alien Property Custodian are held by the Alien Property Custodian under a stipulation duly entered into in an action brought in the District Court of the United States for the Southern District of New York (now on appeal to the Supreme Court of the United States), styled "Francis P. Garvan as Alien Property Custodian, Libellant, v. $50,000 Par Value Bonds, etc.", wherein the trustees of said Munich Reinsurance Company claim a right to the said moneys and properties—a copy of said stipulation being attached hereto, made a part hereof and marked Exhibit "A". The said moneys and properties so held by this defendant are subject to the terms of said stipulation, and may not lawfully be expended save in conformity therewith. This defendant is not now sufficiently informed

to form a belief as to whether the alleged claims of the plaintiffs herein, or any of them, constitute items payable under the terms of said stipulation; but upon the coming in of the proofs in this cause this defendant says that such portions, if any, of plaintiffs' claim as are not within the terms of said stipulation cannot be allowed hereunder.

FIFTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the fifth paragraph of the bill.

SIXTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the sixth paragraph of the bill.

SEVENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the seventh paragraph of the (30) bill.

EIGHTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the eighth paragraph of the bill.

NINTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the ninth paragraph of the bill.

TENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the tenth paragraph of the bill.

ELEVENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the eleventh paragraph of the bill.

TWELFTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the twelfth paragraph of the bill.

THIRTEENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the thirteenth paragraph of the bill.

FOURTEENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the fourteenth paragraph of the bill.

FIFTEENTH: Denies that he has any knowledge or (31) information sufficient to form a belief as to the truth of any of the allegations of the fifteenth paragraph of the bill.

SIXTEENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the sixteenth paragraph of the bill.

SEVENTEENTH: Admits that on or about the 11th day of June, 1920, plaintiffs filed with the Alien Property Custodian what purported to be a notice of its claim under oath in duplicate.

EIGHTEENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of any of the allegations of the eighteenth paragraph of the bill.

NINETEENTH: Denies that he has any knowledge or information sufficient to form a belief as to the truth of the allegation in the nineteenth paragraph of the bill that the Munich Reinsurance Company is not within the District of Maryland, but admits that this defendant, Francis P. Garvan, is not within the District of Maryland.

FURTHER ANSWERING THE AVERMENTS OF THE BILL OF COMPLAINT, THIS DEFENDANT SAYS:

TWENTIETH: That there have been filed with the Alien Property Custodian and are now pending other

suits and claims against the said Munich Reinsurance Company, and that should the plaintiffs herein establish any right to recover in this suit, this court must determine the priority of such claims or suits now pending (32) against the said enemy concern.

This defendant says also that the determination of the Alien Property Custodian as to the enemy character of the Munich Reinsurance Company and of the enemy ownership of the said money and other property is not final for the purpose of this suit, and that the plaintiffs herein must offer proof and this court must determine what, if any, money or property of said enemy is subject to the satisfaction of any claim which plaintiffs herein may establish in this cause.

WHEREFORE, the defendant prays a judgment of the court, and upon hearing, this bill be dismissed, and that the defendant, Francis P. Garvan, go hence with his costs in this behalf incurred.

ROBERT R. CARMAN,
United States Attorney.
Solicitor for Francis P. Garvan, as Alien Property Custodian.

DH-KEM.
July 28, 1920.

EXHIBIT "A."

UNITED STATES CIRCUIT COURT OF APPEALS,
(33) IN THE SECOND CIRCUIT.

Francis P. Garvan, as Alien Property Custodian,
Libellant-Appellee,

against

$50,000 Par Value United States Government 4% Registered Bonds Maturing in 1925, and Other Bonds, Stocks and Other Securities,

J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc.,
Claimants-Appellants.

Francis P. Garvan, as Alien Property Custodian,
Libellant-Appellee,

against

$25,000 Par Value Chesapeake & Ohio Railway 4½% Convertible Bonds, and Other Bonds, Stocks and Other Securities
J. Markham Marshall, Walter T. Rosen and Rudolf Metz, as Trustees, etc.,
Claimants-Appellants.

IT IS HEREBY STIPULATED AND AGREED that in case the Claimant-Appellants above named shall, within sixty days from the date hereof, take an appeal to the Supreme Court of the United States from the judgment and order of this Court in the above suits, or shall obtain a writ of error from the Supreme Court of the United States to review the same:

I. There shall be no supersedeas, but the property proceeded against in the above entitled suits shall be delivered by the Marshal to the Alien Property Custodian notwithstanding said appeal.

II. The Alien Property Custodian shall keep said (34) property intact except as hereinafter provided, until the final determination of this proceeding. The delivery of the property by the Marshal to the Alien Property Custodian hereunder shall be without prejudice to any of the rights of the claimants to prosecute their appeal or writ of error or otherwise defend this proceeding, and such rights shall remain in all respects, except as hereinafter provided, the same as though the property were still in the possession of the Marshal. In case the claimants-appellants shall prevail, the Alien Property Custodian shall deliver and dispose of said property according to the rights of the parties as finally determined in this proceeding, without requiring the claimants-appellants to file a petition or institute any other proceedings to compel such disposition, unless such peti-

tion or proceeding be required by such final determination herein.

III. The Alien Property Custodian may remove and take into his possession as property and funds belonging absolutely to the Munich Reinsurance Company of Munich and not within claimants'-appellants' trust all interest and dividends already accrued or which may accrue and become due before the final determination of this proceeding. Interest and dividends which may accrue and be collected after the "end of the war" as defined in the "Trading with the Enemy Act" or other law superseding the same, shall be segregated and retained by the Alien Property Custodian until the final determination of this proceeding.

IV. The Alien Property Custodian may from time to time sell securities constituting a part of the property proceeded against in the above entitled suits as the same may be needed for paymentts herein referred to, and the securities to be sold shall be selected by the (35) Alien Property Custodian and the claimants-appellants. Provided, however, that after securities have been sold to the extent of realizing the aggregate sum of $500,000 00, no further sale shall be made without the express consent of claimants-appellants. Out of the proceeds of such sales there may be paid from time to time upon the approval of claimant-appellants, claims against the Munich Reinsurance Company of Munich now due and payable or as the same may become due and payable.

V. Where there are securities among those turned over to the Alien Property Custodian under this stipulation, which have already matured, or which by their terms are to mature within two years from the date of this stipulation, such securities shall be selected as the first to be disposed of for the purpose of providing funds for the payment of claims.

VI. The Alien Property Custodian will pay out of the proceeds of the trust funds delivered to him under this stipulation, a reasonable compensation to and the reasonable expenses of the claimants-appellants under the indenture of trust, including legal fees and other

expenses incurred or to be incurred in this suit, and the trustees may without prejudice to the maintenance of their appeal or writ of error herein, and notwithstanding the issuance of such writ or pendency of such appeal, file a notice of claim to the amount of such compensation and expenses with the Alien Property Custodian, and may institute a suit in equity for the recovery of such amount under the provisions of §9 of the "Trading with the Enemy Act."

VII. The claimants-appellants may without prejudice to the maintenance of their appeal to the Supreme Court or of their writ of error in this suit, and notwithstanding the issuance of such writ or pendency of such appeal, (36) file notice of claim with the Alien Property Custodian, under the provisions of §9 of the "Trading with the Enemy Act", for all of the property aforesaid, except as to such parts thereof as may have been disposed of and paid out under the provisions of this stipulation, and may maintain a suit for the recovery of the same under the provisions of §9 of said Act.

VIII. In the event suit shall be instituted as contemplated by either paragraphs VI or VII of this stipulation, there shall be a stipulation entered into therein whereby pending such suit the Alien Property Custodian may continue the payment of claims against the Munich Reinsurance Company of Munich upon the same terms and in the same manner as contemplated and authorized by this stipulation.

IT IS UNDERSTOOD AND AGREED that an order may be entered hereon.

Anything in this stipulation with regard to error or appeal shall also apply in the event of writ of certiorari.

Dated, New York, May 18, 1920.

ROOT, CLARK, BUCKNER & HOWLAND,
Proctors for Claimants-Appellants,

FRANCIS G. CAFFEY,
U. S. Atty. So. Dist. of New York, Proctor for Libellant-Appellee.

ANSWER OF MUNICH REINSURANCE COMPANY.

(37) Filed 26th April, 1921.

TO THE HONORABLE, THE JUDGE OF SAID COURT:

The Answer of the Munich Reinsurance Company, a corporation, one of the Defendants, to the Bill of Complaint filed against it in the above-entitled case respectively represents:

1. On information and belief, this Defendant admits the allegations contained in paragraphs 1 and 2 of the Bill of Complaint.

2. This Defendant admits the allegations contained in paragraph 3 of the Bill of Complaint except that this Defendant denies that prior to the War it transacted in the United States the business of re-insuring risks accepted by insurance, bonding, surety and fidelity companies, as alleged in the third paragraph of said Bill of Complaint, this Defendant alleging that all such business conducted by it was transacted through its foreign office in London, England; and this Defendant denies the materiality of said allegations for the reason that no question arises, or is presented, in the present proceedings which in anywise relates to the business of re-insuring risks.

3. This Defendant admits, upon information and belief, the allegations contained in the fourth paragraph (38) of said Bill of Complaint.

4. This Defendant admits that the United Surety Company and this Defendant entered into a certain contract and agreement during the year 1906, and that the copy thereof filed and marked as "Orator's Exhibit Reinsurance Agreement" is a correct copy of the contract so made and entered into, and admits that said contract was executed in Munich by this Defendant as alleged in paragraph 5 of said Bill of Complaint.

This Defendant denies that the said contract was a

re-insurance agreement and denies that the same partook in any manner of the character of a re-insurance agreement, and denies the legal construction of the meaning and effect of said contract as alleged in the fifth paragraph of said Bill of Complaint.

5. This Defendant, upon information and belief, admits the allegations contained in paragraphs 6, 7, 8, 9, 10, 11 and 12 of the Bill of Complaint, but denies, for reasons hereinafter fully set out, their materiality to the issues in this cause.

6. This Defendant admits the allegations contained in paragraphs 13, 14 and 15 of the Bill of Complaint.

7. This Defendant denies the allegations contained in paragraph 16 of said Bill of Complaint.

8. This Defendant has no knowledge of the matters and facts set out in paragraph 17 of the Bill of Complaint and neither admits nor denies the same.

9. This Defendant admits the matters and facts set out in the eighteenth paragraph of said Bill of Complaint except that it denies any failure on its part to comply with every requirement of the Laws of Maryland, in anywise or at any time, applicable to the Defendant.

10. This Defendant admits the allegations of the (39) nineteenth paragraph of said Bill of Complaint.

11. Further answering, this Defendant denies that it is under any liability whatever to the Plaintiff, arising under the operation of the Participation Agreement, or otherwise, for the reason that the Plaintiff, while in course of performance of the agreement wholly repudiated the same and repudiated all obligations growing out of said agreement, and not only refused to perform the same, but by its own voluntary conduct, entirely disabled itself from carrying out the terms of said agreement or from performing the duties and obligations required of it, with the result that the Plaintiff never has, in fact, performed said agreement, and is not now able to perform the same in whole or in part.

On and after January 1, 1911, and as a result of the settlement between the parties as of that date, the Plaintiff became, and was, charged with the performance of all of the duties and obligations growing out of the said Participation Agreement therein and thereby required to be performed by it, with respect to all insurance covered by said agreement, and still outstanding; and the Plaintiff was bound to the continued performance of such duties and obligations so long as said insurance, or any part thereof, remained outstanding and unsettled; and upon and after final settlement of said insurance, the Plaintiff was bound by the terms of said Participation Agreement to render an account to the Defendant in manner and form as provided by said agreement, and, according to the result of such accounting to pay to the Defendant any difference in its favor or receive from the Defendant any difference in favor of the Plaintiff.

As between the Plaintiff and the Defendant, therefore, it became, and was, the duty of the Plaintiff, among (40) other things, to provide, and at all times maintain, a proper and sufficient fund for the payment of claims, and essentially involved in this duty was the further duty of administering the business covered by the Participation Agreement in such manner as to realize therefrom the largest possible income, and to appropriate and apply the same to the fullest possible extent toward the maintenance of the fund so required to be set aside for the payment of claims.

And to this end it was particularly the duty of the Plaintiff to keep alive its outstanding policies, from which it derived substantially its entire income, and to collect all premiums growing out of the same until the expiration of each risk, and to appropriate such premium income as well as all other available income, as far as might be necessary, in the first instance to the creation and maintenance of its Claim Reserve, and to the payment of its losses.

The Defendant is without information as to the exact amount of insurance outstanding as of Jan. 1, 1911, and subject to the operation of said Participation Agreement. But it appears from the records filed in the numerous matters of former litigation in which the Plaintiff was engaged, that on or about January 1, 1911, there were

outstanding policies of insurance previously issued by the Plaintiff, during the existence of the Participation Agreement, having penalties aggregating approximately $70,000,000.00. Included in said outstanding insurance and constituting a large part thereof, was the insurance covered by the said Participation Agreement, in respect to which, and all of which, the Defendant was charged with the duties growing out of said Participation Agreement.

The Defendant is without information as to the amount of premiums which the Plaintiff should have collected in the ordinary course upon such insurance, but it appears from the last accounting had between the (41) parties that the Plaintiff did, in fact, account to the Defendant for gross premiums collected by it during the year 1910 on insurance covered by the Participation Agreement, amounting to $454,844.42, and, as heretofore stated, at the beginning of the year 1911, there were outstanding policies of insurance, having penalties aggregating approximately $70,000,000.00, included in which, and constituting a large part thereof, was insurance covered by the Participation Agreement, upon all of which outstanding insurance premiums should, and would, have been paid to and collected by the Plaintiff during the year 1911, and during each successive year thereafter until the termination of such insurance, except for the default of the Plaintiff as hereinafter set out; and all of the premiums which should have been collected, as aforesaid, and which it was the absolute duty of the Plaintiff to collect, should, and would have been credited as income and assets to the Defendant under the terms of said Participation Agreement.

In or about the month of January, 1911, the Plaintiff in total disregard of the duties imposed upon it by said Participation Agreement, decided to voluntarily discontinue all business and wind up its affairs, and on the 13th of January, 1911, the Plaintiff was placed in the hands of receivers at the instance of certain of the stockholders and directors of the Company, and with the consent of the Company.

As appears from the records in the receivership proceedings, the Plaintiff was entirely solvent at the time of the receivership and the whole purpose of the receivership proceedings was to work out a practical

liquidation of the Company for the benefit of the stockholders.

As a first step in the process of liquidation, the receivers, immediately upon their appointment, undertook and endeavored to effect the cancellation of all outstanding insurance, including all of the insurance covered by (42) said Participation Agreement, by sending written notice to the holders of the bonds and policies issued by the Company and then outstanding, purporting to cancel, annul and terminate all such outstanding insurance. Thereafter, in furtherance of the plan of liquidation, the Plaintiff caused to be filed in the Circuit Court of Baltimore City, a bill for the dissolution of the corporation, in which the Plaintiff sought, among other things, to arbitrarily bring about the termination and cancellation of all of its outstanding insurance in order that it might be released from all liability growing out of insurance then outstanding and not then in default, including all outstanding insurance covered by the Participation Agreement.

The primary purpose and object of the Plaintiff both in the receivership proceeding and in the dissolution proceeding was to procure and bring about a cancellation or termination of all outstanding insurance upon which no default had occurred, to the end that the Plaintiff might thereby be relieved from all potential liability in respect to such outstanding insurance, and the assets of the Plaintiff might thereby be released from any requirement to make provision for such potential liabilities, and freed for distribution to the stockholders, so far as such outstanding insurance was concerned.

While it is true that the Circuit Court of Baltimore City subsequently refused to permit the Plaintiff to effect the dissolution sought in said Dissolution proceeding, without making provision for the potential liability existing in favor of the outstanding insurance, nevertheless the Defendant charges that, as a result of said proceedings and of the notice to holders of the Plaintiff's outstanding bonds so sent by the receivers, as aforesaid, by far the greater part, and all of the most valuable and most profitable part, of said outstanding insurance was terminated by cancellation, with the result that the Plaintiff released and abandoned all of the premiums on such insurance which, in ordinary course, it should, and

would, have received and collected, except for the action (43) and conduct of the Plaintiff, as aforesaid, and which premiums, as and when collected, would have gone as a credit to the account of the Defendant under the terms of the said Participation Agreement.

In this connection the Defendant refers to the following statement of the Court of Appeals of Maryland in the matter of the United States of America vs. Poe et al., Receivers, 120 Md. 89-95.

"Two years have elapsed since the appointment of the Receivers. At the time of such appointment there were outstanding a large number of policies issued by the Company, having penalties aggregating approximately $70,000,000 00. During the administration of the Receivers the contingent liabilities of the Company upon policies issued by it have been reduced by re-insurance, expiration or cancellation of the policies so that at the present time there are outstanding potential liabilities upon but 2,286 olicices with aggregate penalties of $9,571,250.48."

As appears from the Auditor's account referred to in the 16th paragraph of the Bill of Complaint, and which is the basis of the accounting herein sought, claims aggregating approximately $7,000,000, have been filed in the receivership proceedings to date, of which the Auditor recommended for allowance claims amounting to approximately $563,623.09 and disallowed claims amounting to $6,555,783.77.

The Defendant therefore charges that as a result of the action taken by the Plaintiff to liquidate its affairs and discontinue its business, and particularly, as a result of the action of the Receivers looking to the accomplishment of such liquidation, approximately eighty-five per cent of all insurance outstanding as of Jan. 1, 1911, including insurance covered by the Participation Agreement, was cancelled and terminated, and the premiums thereon accruing and which would have accrued, were released, surrendered and abandoned, all by the voluntary action of the Plaintiff and for the benefit expected to result therefrom to the stockholders of the Plaintiff.

And the Defendant further charges that the insurance (44) so cancelled and terminated constituted, in large

part, if not entirely, all of the sound and substantial risks underwritten by the Plaintiff, and that by the cancellation thereof the Plaintiff not only released and surrendered large and valuable assets in the way of premiums properly attributable as credits under the Participation Agreement, but left in force only the worst and most dangerous insurance on its books, practically all of which subsequently resulted in claims for loss against the Plaintiff.

And further, in connection with the foregoing, the Defendant alleges and shows that whereas during the year 1910 (the year preceding the receivership) the Plaintiff accounted to the Defendant under the terms of said Participation Agreement for the collection of gross premiums amounting to $454,844.42, it now appears from the statement filed by the Receivers in this proceeding, that from Dec. 31, 1910, to the present date, the Plaintiff and its Receivers have only collected by way of premiums $136,460 62, against which they have charged as debits under the head of "Return premiums paid and allowed by Auditor" the sum of $175,600 52.

And the Defendant is advised and believes, and so charges and avers, that by the deliberate action of the Plaintiff and its Receivers, substantially the entire premium income which the Plaintiff was bound to collect for the mutual benefit of itself and the Defendant was destroyed, and the business covered by the contract was, by action of the Plaintiff and its Receivers, stripped of every source of income and left burdened with liabilities only, and that the income which ordinarily, and except for the action of the Plaintiff and its Receivers, would have offset in whole or in large part the liabilities accruing under said contract, was thrown away by the Receivers for their own purposes, leaving as the only business covered by said Participation Contract a large volume of unsound risks which not only paid no income in the way of premiums but finally resulted in losses and (45) claims for which the Receivers are now seeking to hold this Defendant liable.

And the Defendant, therefore, charges that the Plaintiff has never, at any time since January 1, 1911, performed, or attempted to perform, any part of its duties arising under the Participation Agreement, but, on the contrary, has by its acts and conduct in the premises,

wholly abrogated and terminated said agreement and taken and treated the same as altogether terminated and ended.

And the Defendant, therefore, charges that by reason of the acts and conduct of the Plaintiff, as aforesaid, and in consequence thereof, the said Participation Agreement became, and was, wholly discharged as of January 1, 1911, date of the appointment of said Receivers, thereby fully exonerating and discharging the Defendant from all further liabilities thereunder.

12. And as a further defense the Defendant avers and shows that even if the said Participation Agreement has not been abrogated and the Defendant discharged from all liability thereunder, as hereinbefore contended and claimed, nevertheless, under the provisions of the Participation Agreement as construed and declared by the Court of Appeals of Maryland, the only basis upon which any accounting between the parties can now be demanded by the Plaintiff is specifically provided by the said Agreement in Article 13 of said Participation Agreement, as follows, to-wit:

"In case of notice of termination by either party, the account shall be made up not later than two years after the expiration of the notice. Such account shall not be charged with any premium reserve.

If claims are still outstanding, the proper reserve shall be charged, and after the final settlement of each of such claims, the 'Munich' will be paid any difference in its favor and pay any difference in favor of the 'United'."

The method of accounting so provided contemplated that the Plaintiff should set up a proper reserve with (46) which to meet and pay all claims in default, but not actually liquidated, existing at the end of the five-year period of the agreement; and thereafter that the Plaintiff should continue to carry on its business so far as the same related to the final settlement and liquidation of outstanding insurance covered by the Participation Agreement not then in default, or until the final termination of each risk.

In compliance with the purport and meaning of said provision, a fund of $242,420.34 was, in fact, set up as a

Reserve for Claims existing at the end of the five-year period of the agreement, to-wit, existing as of January 1, 1911, to which fund the Defendant contributed its full one-third share as required by the said Participation Agreement, and which fund was sufficient to meet and provide for all liability on the part of the Plaintiff upon claims then known to exist.

With respect to insurance then outstanding but not then in default, the agreement contemplated that the Plaintiff should set aside a proper and sufficient reserve, as measured by the usual insurance standards, to cover and provide for the payment of each and every claim as and when it should arise thereafter, and to this end, should appropriate and apply current income, so far as might be necessary to provide in the first instance a proper claim reserve, as aforesaid.

If, thereafter, in the process of liquidating the said claims, and each of them respectively, the loss actually paid by the Plaintiff should be in excess of the amount so set apart in the first instance as a Reserve to pay such claim, then, and in such case, the Defendant was required by the terms of the said Participation Agreement to pay to the Plaintiff its share of the difference between the loss actually paid, as aforesaid, and the amount so held (47) by the Plaintiff as a Reserve for the payment of such claim.

And if, on the other hand, the amount actually paid by the Plaintiff in the settlement of any claim should be less than the amount originally set up in the Claim Reserve to meet such claim, then, and in such case, the Plaintiff was required by the terms of the Participation Agreement to pay to the Defendant its share of the difference.

But, as so contemplated and provided, the only liability of the Defendant was, and is, to pay its share of the *difference* between the amount *actually paid* by the Plaintiff in final settlement of any claim and the amount held, or which should have been held, by the Plaintiff as a Reserve to pay such claim.

The Defendant, therefore, charges that no accounting can now be demanded or had by the Plaintiff under the provisions of said Participation Agreement, or otherwise, except only as to such claims as the Plaintiff has finally settled and paid.

And the Defendant further charges that even if an accounting be directed by this Honorable Court in respect to claims which the Plaintiff has not actually paid and finally settled, nevertheless, in any such accounting, the Plaintiff should be charged in the case of every such claim, with the amount required to provide a proper and sufficient Claim Reserve, as measured by the usual standards of insurance practice, and should be credited only with the difference, if any, between such amount and the amount in excess of such Claim Reserve which the Plaintiff may be required to pay in final settlement of such claim.

13. And by way of counter-claim, and in the event that this Honorable Court shall determine that said Participation Agreement has not been abrogated, as contended and claimed by the Defendant, and shall hold that the Plaintiff is now entitled to maintain this action for a recovery under the provisions of said Participation (48) Agreement, then, and in such case, the Defendant alleges and shows that by reason of the matters and things hereinbefore set out, and of the defaults of the Plaintiff in the performance of said Participation Agreement, the Defendant has suffered damages on its part to an extent not now ascertainable and which can only be ascertained in a full accounting by the Receivers, covering their administration, and relating to the conduct of the Receivers in the administration of the business of the Plaintiff covered by the Participation Agreement.

And more particularly, the Defendant is entitled to an accounting by the Plaintiff concerning the fund of $242,420.34 so set aside, as aforesaid, in the hands of the Plaintiff for the purpose of paying the claims existing as of January 1, 1911.

As between the parties, the said fund was dedicated to the single purpose of adjusting, discharging and paying certain known and ascertained claims, which had arisen prior to January 1, 1911, out of insurance covered by the Participation Agreement, and, as between the parties, the Plaintiff held the said fund in trust for the sole purpose of adjusting, discharging and paying said claims.

It now appears that in the ten years which have elapsed since the creation and dedication of said fund,

the Plaintiff has paid claims amounting to only $67,173.45, and that the Receivers have in hand a balance of cash amounting to only $20,385.20, none of which appears to be held by the Receivers, or treated, or regarded by them, as in any sense belonging, or appertaining to the said trust fund of $242,420.34.

And the Defendant therefore charges that the Plaintiff is accountable to the Defendant in the premises, and should be required by this Honorable Court to account for and in respect to said fund, with interest from the (49) time when the same came into the possession of the Plaintiff, to the present time, to the end that the same may be made available for the purposes for which it was created and dedicated.

And the Defendant further alleges that the so-called "Statement of Account" filed with the Bill of Complaint, and purporting to show a correct account of the sums alleged to be now due and owing by the Defendant to the Receivers of the Plaintiff, is not only in itself and in the greater part of the items therein contained, wholly incorrect and made up upon an entirely false idea as to any proper basis of accounting, but more particularly the said statement is so partial and fragmentary, and omits and fails to disclose any information with respect to so many matters, proper and required to be taken into any account that might be had between the parties, that it would be impossible without further investigation of the Plaintiff's books and records to form any conclusion as to the true and actual state of account between the parties.

And particularly the so-called accounts presented by the Plaintiff in this proceeding wholly fail to disclose any information, or to make any reference to, the disposition made by the Plaintiff, or its Receivers, of collateral taken and held by the Plaintiff in connection with insurance covered by the Participation Agreement, and in respect to which defaults have occurred.

Nor does it anywhere appear what the Plaintiff, or its Receivers, have realized, or should have realized, in the way of salvage coming into their possession in connection with the adjustment of claims, nor the amount collected, or which should have been collected, from indemnitors, or contracts of indemnity given to the Plaintiff in connection with insurance issued by it.

And the Defendant charges that in any accounting which might be had, all the matters and things above (50) referred to must be taken account of and would constitute credits in favor of the Defendant, and that all records, evidence and information of and concerning the same are in the possession of the Plaintiff and its Receivers.

And so the Defendant prays that if this Honorable Court shall hold that the Plaintiff is entitled to maintain this action, it will, nevertheless, order and require the Plaintiff to render full and just accounting to the Defendant in the premises and fully account in respect to all the matters and things above referred to, as well as in respect to all others matters that may be material to a determination of the true statement of account between the parties.

And as in duty, etc.,

BROWN, MARSHALL, BRUNE & PARKER,
Solicitors for Respondent.

R. E. L MARSHALL,
Solicitor for Munich Reinsurance Company.

STATE OF MARYLAND,
City of Baltimore, to-wit:

I HEREBY CERTIFY that on this 26th day of April in the year one thousand nine hundred and twenty-one, before me, the subscriber, a Notary Public of the State of Maryland in and for the City of Baltimore, personally appeared R. E. LEE MARSHALL and made oath in due form of law that he has read the foregoing Answer and that the matters and facts therein stated are true to the best of his knowledge, information and belief; that he has authority to make this affidavit and that the reason why the same is not made by the Respondent or one of its officials is that no agent of the Respondent is within the distance of one hundred miles of this jurisdiction.

WITNESS my hand and Notarial Seal.

ADDIE B. DEERING,
(Notary's Seal) Notary Public.

STATEMENT OF EVIDENCE IN NARRATIVE FORM APPROVED BY COUNSEL FOR THE RESPECTIVE PARTIES.

(51) Filed 1st February, 1923.

EVIDENCE INTRODUCED IN OPEN COURT MAY 10, 1921.

Present on behalf of the Complainants, Joseph C. France, Esquire, J. Kemp Bartlett, Esquire, Stuart S. Janney, Esquire.

Present on behalf of the Munich Reinsurance Company, R. E. Lee Marshall, Esquire.

Present on behalf of the Alien Property Custodian, Hartwell Cabell, Esquire.

Request was made by Mr. Janney to be allowed to substitute Thomas W. Miller, Alien Property Custodian, for Francis P. Garvan, a party defendant, whom he had succeeded, and request was granted by the Court and appearance of District Attorney entered in open Court for Thomas W. Miller, Alien Property Custodian.

Exhibits filed with the Bill of Complaint offered in evidence and record in case of Poe et al. v. Munich Reinsurance Company, Maryland Court of Appeals, April Term, 1915—No. 55.

ERNEST J. CLARK, produced on behalf of the com-
(52) plainant, having been first duly sworn, was examined and testified as follows:

I am one of the receivers of the United Surety Company and had been connected with the company before the receivership. I was a director and member of the executive committee. The business that was carried on by the United Surety Company was General Surety business which included Fidelity bonds, all classes of surety bonds, burglary, accident and plate glass.

I am familiar with the Munich contract which is in evidence as an exhibit.

The chief cause of the receivership of the United Surety Company was due to the company's being stopped from doing any other business in certain states as early as the fall of 1910. That was due primarily to the action of the Munich Reinsurance Company and the general financial condition of the company. The Insurance Commissioner of Maryland stopped the United Surety Company from doing business on January 11th, (53) 1911, or about two days before the receivership, on the grounds that it was, from an insurance point of view, insolvent. At that time, the United Surety Company had a considerable amount of cash in bank. In a general way its asets consisted of cash in bank; $200,000 of Baltimore City Stock in the hands of the State Treasurer; the Home Office Building which was valued at $250,000; and various other assets in tthe form of securities. And also it had amounts due from agents. The claim against the Munich Reinsurance Company was a very important item in the assets of the company at that time. This claim figured materially in the returns that led up to the receivership, by being regarded as a non-admitted asset because the claim was in litigation at the time. That is one of the principles of the insurance department not to admit any item in the assets of an insurance company where it is in dispute.

The Court: In other words, the Court of Appeals not having decided the case finally in favor of the United Surety Company until a number of months after the (54) receivership?

Mr. Janney: No.

I was appointed one of the receivers on January 13, 1911. The actions that the receivers took with respect to the policies are employed in the reports made to the court from time to time.

I am in the insurance business, and have been receiver of this company from the beginning of the receivership.

The course adopted by the receivers with respect to outstanding business was one of general liquidation for the benefit of all the creditors. It was the only practi-

cable course to pursue under the conditions which existed at that time. The United Surety Company was stopped from doing business after January 11th in all the states of the United States. The agency force naturally became disorganized, the agents throughout the fields sought other connections, leaving the United Surety Company without any machinery whatsoever in the field of its own to take care of its business and it was impossible for them to secure representatives in the place of (55) their agents without incurring a much greater cost than they would be warranted in incurring for the collection of these premiums. Therefore liquidation was the only practical solution for the receivers to take, to get rid of the outstanding contingent liability as rapidly as we could and to settle the interests of the United Surety Company to the best of our judgment, approved by the advice of counsel and orders of court. An average, if I remember correctly, of approximately thirty per cent was paid to agents on premiums collected. The average ratio of losses to premiums in the character of business done by this company was in the neighborhood of thirty per cent and probably somewhat in excess of thirty per cent. If the business would be maintained there would be management or overhead expenses in connection with the matter which would have been very formidable under a receivership compared with that of a going concern because of the legal expenses.

CROSS EXAMINATION.

By Mr. Marshall:

The receivers including yourself were appointed in (56) the suit wherein Thomas H. Bowls was plaintiff against the United Surety Company brought in the Circuit Court of Baltimore City? A. Mr. Bowls who brought that suit was the majority stockholder in the United Surety Company. I do not remember how many sharees of stock he held. He was the majority stockholder and also a director, and was a member of the Executive Committee for probably a few months before the receivership. At the time when this proceeding was brought he was a member of the executive committee.

This suit in which I was appointed receiver was

brought on January 13th, 1911, in the Circuit Court of Baltimore City. At that time there was pending against the company another suit for a receivership in Circuit Court No. 2, filed on December 24th, on a different basis. That was brought by James H. Preston against the United Surety Company, and brought upon the theory that the company was insolvent, and the suit in which I was named receiver was brought upon the assumption that the company was solvent.

In the suit of Bowls against the United a claim is (57) made by the plaintiff that the company was entirely solvent, and that the appointment of receivers was necessary in order to enable it to wind up and protect all interests while it was winding up.

Q. When this receivership proceeding was instituted it was intended only as a temporary measure to be followed as soon as possible by an application to the court for a dissolution of the corporation? A. I have no recollection of any such agreement or understanding in contemplation on the part of the receivers.

Q. Isn't it a fact that the receivership proceeding in which you were appointed was brought about—rather its immediate institution was caused by the pendency of the Preston case in the Circuit Court No. 2? A No, it was not brought primarily on that account. As I remember it, it was brought on the judgment of the officers and directors of the United Surety Company and on advice as the best, and, as a matter of fact, the only way to (58) conserve the interests of all creditors first and stockholders next. Naturally they opposed any such action that was pending in the other court on the ground of insolvency as the officers and directors did not believe the United Surety Company to be insolvent at that time from a practical point of view, only from an insurance point of view, because as I have stated before the Insurance Commissioners will not admit an asset, be it ever so good, provided there is any litigation pending regarding that asset, and by the elimination of the claim against the Munich Reinsurance Company it left the capital of the United Surety Company impaired from an insurance point of view. There is a distinction between insurance insolvency and practical insolvency.

Q. Isn't it a fact that at the time when the Bowls case was instituted the directors of the company were

then considering calling a meeting of the stockholders for the purpose of voting a dissolution of the company? A. It is not a fact as I remember it. The receivership was brought because of the fact that the Insurance Commissioners took this action and not because of the action, or any suit pending, by Preston.

Q. What I am trying to find out is whether or not (59) the directors of the company were not contemplating at the very time of this receivership, a dissolution of the company through an order of dissolution in a case brought for dissolution and not in the receivership proceedings? A. I don't remember any such action contemplated on January 13th, 1911. A bill for dissolution was filed in February. I don't remember when dissolution was first discussed by directors, because it has been ten years since those discussions occurred. I cannot place the date when the first discussion was had.

I probably saw the answer filed by the Surety Company to the Preston Bill of Complaint. It was drawn up by Mr. Farber, one of our counsel at that time, and was signed by Mr. Poe as President and Mr. Diffendaffer. Secretary. In that answer Mr. Farber denies categorically and emphatically the allegations of the Fifth paragraph of said Bill of Complaint to the effect that this respondent is insolvent and then charges Mr. Preston with having made the statement that it was insolvent with full information and knowledge that it was not In support of his denial, his categorical and emphatic denial, Mr. Farber lists, or refers to, the assets of the (60) United Surety Company and concludes his summary of those assets in a statement that the total assets of this company aggregated over $800,000, and he then said that this respondent company now has a considerable surplus over and above its liabilities including in such liabilities all proper premium and claim reserves and not including among its assets many of these so-called non-admitted assets such as salvage and so forth, and premiums in course of collection, which are of great value to the company, and this company is therefore not insolvent. I was familiar with the above statement made by our counsel. And that represents the fact, so that at that time the company was not insolvent from a practical point of view. Your Honor from the standpoint of viewing as the officers did, and as the receivers did, the United

Surety Company's claim against the Munich Reinsurance Company at approximately $200,000 or whatever it was, from that viewpoint it was not insolvent.

The Court: It would not be quite courteous, I suppose, to ask you how it is that if the concern was solvent when it passed into the hands of yourself and associates it has turned out to be so very insolvent after it has remained in your hands? A. That was due to the sub-
(61) sequent depreciation in assets. By way of illustration the Home Office Building, which has cost the company $254,000, was subsequently sold by the receivers, and after they had held it for five years, for $100,000 There was a depreciation of $150,000 in real estate. The Baltimore City Dock Stock, which had been purchased at a cost of $220,000, has been sold by the receivers at the best market price they could secure for $150,000. There was another shrinkage of $50,000. There was $200,000 shrinkage in two items alone which we had no reason to anticipate at the time the company went in the hands of receivers.

Q. Wasn't it calculated by the receivers and by the officers of the company at the time of this receivership that if the company could be freed of its liability or its potential liability on outstanding bonds that it could wind up with comparatively large funds for distribution to its stockholders? A. No, it was not so anticipated. Our settlements which under advice of counsel and orders of court we made for several months indicated that.

Q. I am not talking about what happened after the
(62) receivership. I am talking about what happened before the receivership; at the time of the receivership wasn't it a matter of discussion between the officers of the company as to whether or not the liability of the company for its outstanding bonds would be terminated, or could be terminated, by virtue of a receivership proceeding—didn't the company consult counsel to ascertain whether or not it was legally possible for the company to terminate its liability, its potential liability, in respect to outstanding bonds, didn't you ask Mr. Carter? A. Probably we did, but I don't remember the exact cir-

cumstances. We may have asked Mr. France. I don't remember that.

Q. You don't recall that the question of getting rid of this liability was a matter of discussion at or about the time of this receivership and this dissolution proceeding? A. I don't remember that particular discussion. The receivers had a great many discussions about (63) that time relative to the best method of getting rid of contingent liability to the best interest of the entire concern.

Q. Wasn't it a matter of calculation and discussion that if the company could legally rid itself of its potential or contingent liability it would then have enough in hand, or expected to have enough, to pay its outstanding debts and distribute a surplus to its stockholders? A. It is quite possible we did and the receivers would have been very happy. I don't remember whether it was so or not. We may have had such discussion.

The Court: I suppose the chances all are that nearly all phases were talked about. A. This receivership had to make a great many precedents that we did not have to go by and the consequence was I discussed many things and it is quite possible we discussed that. I do not remember. We had, if I remember correctly, about $69,000,000, between sixty-nine and seventy millions, of total outstanding contingent liability on January 13th, 1911. As the Munich Reinsurance Company's contract (64) did not cover accident and plate glass, which constitute a very small portion of the outstanding contingent liability, I should say offhand that ninety per cent—I may be wrong on that—but the largest portion of that contingent liability the Munich was interested in.

I have been in the insurance business for about thirty years. For the past 25 years I have served as State Agent of the John Hancock Mutual Life Insurance Company for the District of Maryland and District of Columbia.

Olin Bryan, I believe, conducted the direct negotiations for the contract with Schreiner as representing the Munich. He died about a year ago. I had nothing to do with the negotiations with Schriner. I do not know who prepared the contract in this particular case. I was

familiar with the terms of this particular contract, but I am not now without re-reading the contract.

I am still one of the receivers of the United Surety Company's assets.

I am familiar with the general terms and have generally kept in touch with the administration of those assets from the beginning up until the present and fairly active in it, as a receiver.

Q. When it came to the end of the cancellation of this contract which was brought about by a notice served by the Munich upon the United, the cancellation actually taking effect on 1st day of January, 1911, as I recollect it, what did the United, or I will say, how did the United and the receivers, when they were appointed, treat the insurance then in force under the contract on their books with respect to premiums? In other words, what did they do with the premiums that came in? A. (65) In what particular respect?

The Court: Renewal premiums on policies.

Mr. Marshall: The annual.

Mr. Cabell: Strictly speaking an annual premium is a premium as an insurance man understands it for a new thing. It is not a replacement except in the few cases in which there is an annual payment on a continuous risk. I am talking about annual payments on continued risks.

The Witness: You refer to the continuing policies of insurance?

Mr. Cabell: Yes.

A. The policy of the receivership was, so far as was possible, to collect premiums, to continue to collect premiums on all outstanding uncancelled insurance. We were greatly handicapped because of the loss of our field machinery for that, but we did continue to the best of our ability in every way, shape and form possible to collect those premiums, at the same time cancelling the continued liabilities on the basis of general liquidation.

I understood and accepted the fact at that time that (66) the Munich had an interest in the premiums we were collecting on that class of business, and we carried it on the books as an item in which the Munich had an actual interest, so far as their contract covered those premiums. We were collecting premiums in which they were not interested.

Q. I confine my question to that class of business in which the Munich was interested under this contract. There is a copy of the contract and when you turn to Section 3, Paragraph 13, Article 13, the latter part of that article, you will notice, deals with what shall happen in the event of the cancellation of the contract and the filing of a final accounting. The only difference in the final accounting so far as I see as distinguished from the first accounting is that in the final accounting there is to be set up no premium reserve, is that right?

The Court disputed questions of construction of the written contract—I suppose the witness may be more competent than the court to construe, but the court won't (67) be able to put the responsibility of construing it on the witness.

Mr. Cabell: Just to show a course of action.

The Witness: My only answer can be a repetition of the wording of that clause which is very specific.

In the actual conduct of the business we did not treat this final accounting as cutting off either the liability of the Munich for a third of the losses which would develop thereafter, or the credit to the Munich of a third of the premiums which would be collected thereafter.

Q. In making up your account against the Munich which is presented in this case, you first took as an asset the premium income that you had collected since the last of the accounts that had been made under supervision of the Court Auditor, did you not? A. Your Honor, before answering that question I might state that the actual details of handling the Munich account was referred by the receivers very largely to Mr. Janney, counsel, who had that particular question in charge. Consequently,

at this late date I am not in a position to answer exactly (68) and specifically certain detail questions with respect to the handling of this account. My knowledge was a general one.

The Court: I think on the whole if the information is important it better be gotten from the books themselves.

Mr Cabell: It would come from the account filed. I am trying to find out what he knows about the way the business was transacted? Apparently I am in rather a dry well.

The Court: If he had counsel in such a matter as this I think he was perfectly justified in letting them earn their fee.

A. I am certain in my mind that under the contracts and as we conducted the affairs of the United we gave credit and expected to give credit to the Munich for these premiums that we were collecting, and I understood at that time, as I understand now, that wherever we by any act of ours reduced the amount of premiums collected, we thereby reduced the right of the Munich in (69) those promiums.

I have no idea as to what our loss ratios were for the first four years of that contract, because the loss ratios—in other words, we were not able to keep an account of loss ratios in the same form or same manner as the United Surety Company as a going concern. The conditions were entirely changed. The methods of bookkeeping were entirely changed. There were no new premiums to amount to anything coming in. Consequently, the loss ratio was being saddled with additional legal expenses. I don't remember what were the loss ratios in the years 1906, 1907 and 1908, but in the early history of the Surety Company they were, as I remember, low and even in this last year before the receivership the actual loss ratios were not excessive so far as I remember. 30% is ordinarily considered to be an average loss ratio on an insurance company that has been going a number of years.

The Court: I suppose any insurance company of its calibre, unless it is conducted with great recklessness, has a very small loss in the early years of the company?

The Witness: Practically none the first year. The second year very small, and it works up to about thirty per cent of the premiums, when it comes into its full loss ratio.

I do not think there was a change in the character of underwriting during this whole period of time when the (70) United was in active business. The United Surety Company had practically the same underwriters throughout that period, the same underwriters at the close that they had in the beginning, and so far as I would know there was no order directing them to underwrite with different methods from what they started with.

The loss ratio of a surety company is approximately 30% of its premium receipts. Its acquisition expense about 30%, and its overhead about 30%, and figure on about 10% profit. Our overhead would include cancellations. We had no cancellation in other forms of insurance than surety and fire. We have cancellations in this class of business.

I should have stated all other expenses, commissions about thirty per cent and all other expenses about thirty per cent and the profit about ten if the underwriting is normal.

Under that theory, if this mass of business which was left in the office by the termination of this contract had (71) run to normal with the United Surety Company as a going concern, the premiums from that mass of business would have taken care of losses, if those premiums could have been collected.

The Court: What is the object of getting that from the witness. It is certainly evident that an insurance company continues in business under such terms as it can continue in business, that there will be something to the good each year. Otherwise it could not continue in business very long.

Mr. Cabell: Unfortunately, a large number of insur-

ance companies are operating, so far as the underwriting side is concerned, at a loss practically all the time. They gain by their banking end, by their income from their surplus. What I am trying to get this witness to state is whether they treat this body of insurance as a part of the business of the going concern and ask him whether it would take care of this. That is, of course, on the theory of the first defense here which is if it had been permitted to take care of this there would be no call on the Munich for any part of the losses.

RE-DIRECT EXAMINATION.

By Mr. Janney:

The receivers undertook negotiations looking to the (72) re-insurance of the risk of the United Surety Company immediately preceding or during the receivership. Prior to the receivership the officers of the United Surety Company made every possible effort to re-insure the business through the medium of conferences with officials of local surety companies and also through conferences with New York Surety officials, but they found it was impossible as no re-insurance agreement could be effected on the basis of taking over the entire business of the United Surety Company. They wanted to take only the good business and leave the questionable business in the hands of the officers, which, of course, would have been thoroughly disastrous to the interests of the estate. After the receivership January 13th, the receivers made further efforts along those lines with the same results and there was no alternative then to continue the liquidation of the estate as they did.

We had a conference with the presidents of the com- (73) panies in the city here—Mr. Bland and Mr. Warfield and Mr. Stone, and Mr. Whalen, and there was a further conference with the New York Surety people, the names I now forget. The best proposition that could be gotten was that the United Surety Company were to pay these corporations to take over such business as they selected, and that would leave the United Surety Company without the money to take care of the losses, but with the losses. The surety company would have to pay all the legal reserve on the good business and hold the bag, so that proposition was rejected.

The Court: You have given certain instances which in the end brought about, or precipitated, receivership of this company, but if I understand, for example, the disallowance of your claim on the Munich Re-insurance Company, after all they would not necessarily have resulted in disaster to the company had the company's business on the whole been as profitable as the percentages ordinarily relied on would have made them, is that right?

The Witness: I think the business was as profitable (74) as could have been expected so far as the underwriting was concerned. The underwriting may have shown a slight loss over the normal ratio, but had the United Surety Company received the co-operation which it expected from the Munich Reinsurance Company, had the Munich Reinsurance Company paid its claim to the United Surety Company, I feel that the receivership would not have been necessary.

The Court: If the Munich Reinsurance Company did not pay you anything, you during that time did not pay them anything either, did you?

The Witness: We would have had to pay them its share of the profits.

The Court: You would have had to unquestionably if you had gotten from them the losses, but in point of fact you did not pay anything to them or they to you until after the decree of the court some months after the receivership, is that right?

The Witness: There was no settlement at all until after that because the claim had been in dispute on their part.

The Court: Now then, wasn't your financial situation (75) in fact a little better off in that whatever profit there would have been on the three-thirds of your business you would have received, instead of on two-thirds?

The Witness: I do not so regard it, your Honor, be-

cause the specific item as carried in the assets of the United Surety Company representing their claim against the Munich Reinsurance Company for its share of losses up to that time represented the difference between insurance insolvency and solvency.

The Court: If you could not make that claim against the Munich, I assume that the Munich could not possibly make its claim against you if it had one for one-third of the net premiums you have received on the three classes of business in which they were reinsurers, participators or whatever they were, that is so, isn't it? In other words, if they did not owe you anything, you did not owe them anything?

The Witness: No, but they did owe the United Surety Company and the United Surety Company did not owe them.

Q If your whole business was profitable, as you say you think it was, the net result would have been, striking of accounts in any sort of way, you would have owed the Munich something more than the Munich would have owed you, isn't that so?

The Witness: Theoretically, your Honor, yes.

The Court: Where does the theory break down in practice?

The Witness: The difference between the theory and (76) the practical facts in the case are these, that an insurance company is not a profitable enterprise to stockholders in its early years because of the heavy organization expense it assumes right off and other expenses that are entirely eliminated after the first two years. Every insurance company, especially life insurance company, do not reach the point—those operating on a stock basis—until after 10 or 15 years because or the heavy field organization expenses. That was the reason more than the underwriting why the United Surety Company showed a loss up to that time.

The Court: Then you say that taking these factors

into account and had the relations between the Munich and yourself been entirely pleasant all the time and each side done just what they should have done under the terms of the contract, the Munich would have paid you under that supposition more money than they would have gotten from you during those first four years?

The Witness: Yes, more money than our profits for the first four years would have been. The account here which we are asking the Munich to pay is based on the (77) theory that the Munich owed us one-third of the net losses resutling from that business regardless of whether we paid our claim or not on this portion of their business. In the running of our business as receivers and before that we did not credit the Munich Insurance Company with the premiums that were due them on this insurance whether we collected it or not.

Q. In other words, your theory is that although it makes no difference to the Munich as to whether you have paid a loss or not it does make a difference to you whether you collect it or not when you credit up the amount of premiums to the Munich, is that right?

The Court: That is the result of it I suppose.

The Witness: I prefer that question to be put to Mr. Janney or Mr. France because they are familiar with the technical phases of the handling of this contract and I am not. My answer would simply be an assumption.

RE-CROSS EXAMINATION.

By Mr. Marshall:

The officers had certain negotiations prior to the receivership.

Q. I mean the company had with the officers of other (78) casualty companies here looking to the reinsurance of these risks. Isn't it a fact that while these negotiations were pending and before they had been concluded that the Preston suit was filed against the company in the Circuit Court No. 2 asking for a receiver on the charge of insolvency. A. There were negotiations

pending prior to the date you refer to, which was December 24th, 1910.

The Witness: Yes, pending with a different group of men prior to December 24th, 1910, as following the action of the Massachusetts Insurance Department and the New York Department which indicated it was advisable at least for the United Surety Company to reinsure if possible. Now on December 24th, there were other negotiations pending when this bill was filed.

Q. Isn't it a fact that those negotiations which you have testified to just now in answer to Mr. Janney's questions, namely, the negotiations with Mr. Bland of the United States Fidelity & Guaranty Company, with (79) the Fidelity and Deposit, and the American Bonding, and Mr. Stone of the Maryland Casualty Company—is it not a fact that those negotiations were terminated and broken off because Preston filed his suit? A. No, because they were not the negotiations that were going on on December 24th.

Q. Let me read to you what your counsel said in answer to the bill filed by Preston. He refers to these very negotiations that you are talking about now. I am reading from page 9. "During the discussion the members of the executive committee heard for the first time that a bill of complaint had been filed by James H. Preston on that morning to have receivers appointed for the United Surety Company. This fact put an end to the conference when four of the directors, to-wit, Messrs. Janney, Williams, Penniman & Gaither, proceeded to the office of James H. Preston for the purpose of obtaining if possible, the withdrawal of the bill on account of the great injury which its publication would assuredly do to the affairs of the Surety Company and particularly in view of the pending negotiations. (Continuing reading)."

The Witness: They are exactly in accordance with (80) the facts and in the line of my testimony. These negotiations were being conducted with the New York Corporation on that morning and not with Messrs. Bland, Stone, Field or Whelen.

The Court: Mr. Preston's actions according to the

testimony of the witness was one of the ostensible causes of breaking down some of the negotiations they had and they took up some others with some other people here and the other people did not like the business of the United Surety Company as a whole and were not willing —could not see any money in taking over the business of the United Surety Company as a whole, and if they started to pick and choose it was not to the interest of the receivers of the United Surety Company to give them the cream and keep the skimmed milk.

STUART JANNEY, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Marshall:

I am one of the receivers of the United Surety Com-
(81) pany. I was appointed on January 13, 1911, and prior to that time I was a director of the United Surety Company. I had been a director for a period when this contract was negotiated as a matter of fact, then I was not a director again until Mr Bowles had acquired an interest in the United Surety Company and I became a director in his interest a few months before the receivership. I was connected with the company at the time of its organization, in 1905 and 1906. I don't remember the date that I was elected a director—I suppose the records will show—but I was elected a director early in 1906. I had been retained as one of the lawyers of the company for a time, and had been made a director. Speaking generally, I have been from the beginning in close touch in one capacity or another with the affairs of the company, and I know pretty fairly its history. I know the history of its organization and the history of its business and the history since the receivership.

The contract, itself, drawn substantially as it is now, was referred by Mr. Bryan to Charles W. Field and me, with the request that we examine it from a legal point
(82) of view, and if we had any suggestions, communicate them, and we did examine it and consulted together about it and actually went to New York finally and met Mr. Shriner and talked over some phases of the contract

with him in New York. Mr. Shriner, at our request, or we together there made some changes in it. I don't remember what they were but they were not very material in so far as the general purpose of the contract was concerned.

Q. Coming down to the time of the receivership, the original receivership, that is to say the case which was instituted on January 13, 1911, it was not instituted for the benefit of the creditors at all, was it? A. Well, that receivership was brought on by the very critical condition that had arisen. No creditor filed it; certain stockholders filed the bill.

Q. There are two forms of receivership contemplated, one for the benefit of creditors and one for the protection of stockholders. This one was for the protection of stockholders, wasn't it? A. I never understood any such difference in receiverships. I think Mr. Preston's bill (83) was based upon the rights of creditors of an insolvent corporation. The action of Mr. Bowls was not based upon the right of a solvent corporation to dissolve. It was based upon the general equity arising out of the insurance insolvency which had arisen with respect to the United Surety Company, and the United Surety Company having been first driven out of various States of the United States on account of the impairment of its capital then was forbidden to do business on January 11th, 1911, by the Insurance Commissioner of Maryland, that being the State where it was incorporated. It could not do business anywhere. The United Surety Company at the time had outstanding contracts with agents all over the United States. Its assets were partly in the hands of the State Treasurer and partly tied up in a large building.

The Court: Is it worth while very much, except in so far as it appears from the face of the pleadings, upon which you can base whatever contention you can base on it, to go much farther into details on this? The business was stopped practically speaking by the action of the Insurance Commissioner. The other proceedings after that may have a certain amount of legal effect one way or the other but the action of the Insurance Commis- (84) sioner of Maryland following on that of New York and Massachusetts put the company out of doing business beyond any controversy. Something had to be done

to change that situation or if you could not change it as apparently they did not change it, to act under it.

A. I was appointed together with Mr. Poe and Mr. Clark the original receivers in the case, by Judge Heuisler, on the 13th of January, 1911. I cannot tell you the volume of the insurance that was outstanding on January 13, 1911, and not in default in which the Munich Company was interested under this contract. I can tell you December 31, 1910, and qualify it by the fact that very little business was written in those ten days. There was outstanding Fidelity Business, Fidelity Bonds, of $12,656,672. The premiums on those was $46,192.36.

Q. That is per annum?

I am not sure; I do not think so. Those premium bonds were Fidelity bonds, generally speaking, bonds guaranteeing the honesty of bank officials. That was always annual premiums.

Q. So there would be an annual income on that amount— A. In so far as the Munich was concerned (85) I would think there would not be an annual income of that amount because the bonds of bank officials were an annual policy to the bank and therefore when the Munich contract expired any renewal I think would be a new item of business. We would not have held the Munich liable for any default that occurred after the period of the contract.

The Surety business outstanding was $40,924,470, of which the premium was $239,582.

The Court: What is the distinction between a Fidelity bond for the honesty of some particular official and the Surety bond?

The Witness: The Surety Bond includes all contract bonds and receivers bonds and executors bonds, they are all classified as surety bonds, guardian bonds, trustees bonds, bonds against turning up of lost instruments and bonds for inumerable things.

Mr. Cabell: Wouldn't you call it a surety business where it is connected with a trust or with a contract, whereas if it is a question of fidelity in employment it is called fidelity.

As to Burglary, there was outstanding $7,667,316 of (86) liability. That is the same as fidelity business so that each contract expires at the end of a year and then you issue a new contract or a renewal slip.

I think I can give you copies of those contracts as used. I have no doubt they are in our files.

Mr. Cabell: I am entirely in accord with Mr. Janney that where there is the actual termination and a new transaction then the Munich's interests stopped. I think it is important that we should get the forms of those contracts to see whether they are replacements or renewals.

The Court: And with a fidelity bond—

The Witness: You give that to a bank guaranteeing all of their employes. That is given on an annual basis always.

The Court: One thing might be said about the good will of the business. For instance the reasonable expectation that if the 27th National Bank has been insuring with you this year you would be able to get that business next year and get it at the most trifling expense whereas if you drop that and have to take up with the (87) 28th National you have more trouble.

Mr. Cabell: Yes, and the different companies have their different practices. One company that goes into a contract bond may say, "We are taking those as annual installments." The next company may say, "No, that whole premium is a unit but we will divide it into five years which is the contract period." With the fidelity business a great many of the companies worked as an actual contingent obligation pending the payment of annual premiums until either side sees fit to terminate it.

The Court: You will produce those forms which I think undoubtedly you will have in your files, a great number of them.

The three classes of insurance which I have referred to, namely, fidelity, surety and burglary, foot up to $69,-268,458.

Those were the only three classes of insurance that the Munich Company was interested in at that time. That was the volume of insurance business on the books as of December 31st, 1910. The premiums that would have been collected or the premiums that attached to that insurance, as I stated, amounted to $345,529.92. That was the conditions as of December 31st, 1910.

(88) Q. Which is the premium, I take it, you would have expected to have collected, would have been entitled to collect if nothing had happened and the company had pursued the even tenor of its way during 1911? A. Of course, in writing contract and maintenance bonds one charge is made—for instance on paving bonds the company made one premium. This covered the construction of the pavement and maintenance for a period of five or ten years according to the municipal ordinance. It was all collected at once, but executors and administrators and trustees and receivers paid annually although it was only one bond.

Now, to take up that phase—the so-called contract bonds.

In the testimony that was taken in the case before Judge Heuisler in connection with the case of United States of America against Poe, Receiver, and also included the petitions of the Fidelity & Deposit Company and the United States Fidelity & Guaranty filed in that case,—this question as to what the nature of the premiums was on contract bonds was a matter of discussion and investigation.

(89) The Court: That $345,000 of premium, the larger part is what you call Fidelity business, wasn't it?

The Witness: No, sir, the largest part of that premium was the surety business. The Fidelity business was $46,000 and the Surety $239,000.

Mr. Cabell: In surety business connected with contracts or trusts, first take the question of your trusts. That would be surety business, guardianships and so forth?

A. Yes. There we collect an annual premium, and the other class of surety business, for instance, surety on building construction, there we collect the lump sum premium in advance. We did not collect anything after that lump premium. So that out of all of those contracts we had gotten all that we expected to get.

Mr. Cabell: Have you any classification that will give us the exact amount of those particular classes, because I think that is quite important.

Mr. Cabell: And when you cancelled it you had to pay it back out of your assets—a part of what you had (90) collected you had to pay for cancellation in other words.

The Witness: I am able to give you some facts from which that can be deduced.

Q. (By Mr. Marshall): I refer to the testimony taken in the dissolution proceeding before Judge Heuisler and the question came up as to what was the character or nature of the premiums paid or collected on the so-called contract bonds. Mr. Bartlett's witness, the United States and Fidelity & Guaranty Company witness, was on the stand and he was asked—a bond was submitted to him, one of contract bonds, the bond of Stewart Kirbaugh Company, and he was then asked the question, what is the annual premium on that. He says that is a term premium. That is what you mean, isn't it? A. Yes. That is where one pays $1200 to the United Surety Company for the whole term.

Q. When you take an annual premium in that connection, you mean the premium settled up during the

year for the whole term, don't you? A. I do not understand you.

Q. Suppose the bond is going to last four years and (91) the annual premium is only one-fourth of the whole premium. As a rule the premium is figured evidently so much—(reading)—isn't that what you mean when you speak of term premium? A. Yes, except I think that contracts for a long period of that sort were not so very abundant and that was a question of arrangement of convenience for the contractor and the surety company. Unquestionably a lump charge was made Now that it was divideed over a number of years was another question.

Q. In other words, you say $5000 would be our premium for this bond payable in annual installments over five years? A. Yes.

The Court: And any case where they could get it at once they got it?

The Witness: Yes.

As to these things that we call term premiums while they may have represented lump sums they were notwithstanding payable in installments in a great many cases.

Mr. Cabell: Could we classify from your books the (92) premiums that you have obtained in full and the premiums that you still had some installments to come in?

The Witness: I am not sufficiently good an accountant to tell you that. I doubt it. I think in each file you would ascertain the terms under which the bond was written. I haven't an idea what percentage of our business was in deferred payments of premiums I can guess it was very small with us. Where they were united with other companies on some work such as the barge canal in New York and where it was going to take a number of years, I have no doubt the United Surety Company had a share in such bonds. That was our heavy business, usually big contracts, and the contractor always insist-

ing on spreading his premium liability over the term of his contract.

There was $61,268,000 of bonds on the books December 31st, 1910, and showing an annual premium of $345,529. That was substantially the condition when we took charge as receivers in January, 1911.

The receivers, of course, in all cases after consultation with and generally following orders of the court, adopted the policy of insurance cancellations, cancellations to (93) the fullest possible extent to get rid of the liability. The receivers conceived that they were in liquidation—in the first instance the receivers believed that and the court so ruled, and the receivers were advised by their counsel that the effect of the receivership was probably the cancellation of outstanding risks. An order was passed by Judge Heuisler to the effect that based on the general proposition that the company in the hands of the receivers was incapable of carrying out its contracts, amounted to a breach of contract, and that the outstanding bonds therefore were cancelled and the various owners of them had claims for damages against the assets of the receivers. That was Judge Heuisler's ruling. That ruling however, was reversed on appeal and the Court of Appeals said that that would be the effect of actual insolvency but was not the effect of a receivership for insurance insolvency, such as we had in this case, and of course that left the receivers in a very puzzling situation. The company had all of the reserves that the law required, and that the actuaries of the Government authorities had required, and said were necessary to be charged on their books, and they had only (94) the assets that were admitted and still showed a surplus over and above probable liability, and while, when you come to write down the assets and estimate the liability, you could very easily show that the company would probably liquidate solvent or insolvent you could not be sure of it either way.

Q. By refreshing your recollection the receivers who were appointed on January 13, 1911, did not regard themselves at that time as receivers for the purpose of liquidation until April 10th, 1911, after Judge Heuisler had

refused to order the dissolution of the company in the dissolution proceedings? A. That is not true.

Q. Here is a petition that was filed by the receivers signed by Poe, Janney & Clarke, Receivers, through Mr. Gaither and also through Ritchie & Janney. This was filed on the 10th of April in the receivership case and recites this: That since the appointment of your petitioners as receivers by this court on January 13th, 1911, your petitioners have proceeded to manage and direct the affairs of the United Surety Company—(reading).

(95) And then we asked for an order to authorize us to go ahead with the process for the purpose of winding up this company.

Q. Isn't it a fact then that the purpose of winding up the company, the policy of treating the receivership as a receivership for the purposes of dissolution, was not finally adopted until the dismissal of the bill by Judge Heuisler on March 30th, the bill of dissolution? A. The appointment of the receivers had no reference to the application for dissolution but unquestionably the receivers were aware of the fact that this application was to be made and it would be quite possible that the court, if it did dissolve the corporation, might conceive it its duty to appoint receivers in the dissolution proceedings rather than retain those that they had and we were examining into the affairs and status of the company while this proceeding was going on. When it was ended we represented to the court, however, that this being the case we would like instructions as to a definite policy and that was the purpose of that petition.

(96) Q. On the 13th day of January, 1911, the day you were appointed receivers, did you participate in the meeting of the Board of Directors held on the same day, to-wit, the 13th day of January, 1911, and instruct the president to call a special meeting of the stockholders for the purpose of determining whether or not in view of the then condition of the business affairs, whether or not a petition or bill for dissolution should be filed as provided by the laws of Maryland. A. I don't remember—I think on account of the fact I was appointed receiver I was very busy, and in the second

place had an idea that it was probably a matter for the stockholders to attend to. I do not think I attended—

The Court: There is no doubt in the world that the company was in a condition where the only thing was to bury it as decently as possible.

Mr. France: We are ready to admit it was. It is a question of how you could do it with the least injury to the policy holders and everyone else.

The Court: If it is a material matter in the case whether this dissolution was nominally voluntary the (97) papers will have to speak as to that. As a matter of fact the testimony I think up to date, and I do not think it is contradicted, shows beyond any question that the action was not voluntary in any sense but that the winding up of the company was an absolutely necessary thing. When an insurance company is refused permission to do business there is nothing to do but wind it up.

Q. It appears from this paper I have just referred to that as the result of the efforts of the receivers the outstanding liabilities were reduced—I mean the outstanding bonds and policies were reduced, to the extent approximately of one-fifth in the period between January 13th when they were appointed to April—

The Court: In about three months they had cut it down—

The Witness: Of course a great deal of that would by by natural cancellation and also a great deal would be due to that class of policies such as Fidelity, and Burglary, where the policy is loose and they are cancelled practically immediately. A bank always will cancel immediately its policy under these conditions.

Q. Isn't it a fact that the receivers themselves com- (98) municated with and advised the holders of policies, outstanding policies, practically immediately after their appointment, notified them directly or indirectly to cancel their policies? A. Urgueed them to do so.

Q. And a later period—I show you this printed order

of the Circuit Court of Baltimore City passed in the case of Bowles against the United Surety Company and ask you if the receivers did not forward that order directly to the holders of all the bonds and policies of the company. A. My recollection is, although that order was subsequently reversed on appeal, we sent it out immediately and subsequently application was made to set the order aside. We would not have sent it out if we had known it was going to be appealed.

(Printed order referred to, having been offered in evidence, was marked by the stenographer Defendant's Exhibit A.) and is as follows:

"UNITED SURETY COMPANY RECEIVERSHIP

In the Circuit Court of Baltimore City.

Thomas H. Bowles, et al,

vs.

United Surety Company et al.

(99) (Charles J. Mansfield vs. Alice M. Connolly)

Upon the petition of the Receivership filed in this case, it is this 10th day of October, in the year nineteen hundred and twelve, by the Circuit Court of Baltimore City, adjudged and ordered—

1. That February 15th, 1913, is hereby fixed as the final day for the filing of claims in these proceedings by the bond holders, policy holders and creditors of the United Surety Company; and only claims filed on or befor said day shall participate in any distribution of the assets of the Company to be made to the creditors by the Receivers.

2. That no default under any outstanding bond or guaranty of said Company of any character occurring after the 13th day of January, 1913, shall give rise to a proveable claim in any distribution of the assets of the Company to be made to the creditors by the Receivers.

3. That the holders of outstanding bonds and guarantees under which no claim for loss is made, be and they are hereby authorized to file claim against the Company for the amount of loss arising from procuring substitute bonds at prevailing rates or for the unearned premium. If the holders of bonds guaranteeing the maintenance of construction or other work for a fixed period are unable to procure substitute bonds on such terms, they may claim under the provisions of paragraph 4 hereof.

4. That the holders of outstanding bonds and guaran-
(100) tees under which claim for loss is made, but such claim is unliquidated or not definitely ascertainable, be and they are hereby authorized to file for the penalty of the bond,—in order that their claims may be subsequently considered and a proper reservation of assets made therefor, if and when the same are definitely established.

5. That the Receivers cause a copy of this Order to be published at least once a week for three successive weeks prior to November 15th, 1912, in a newspaper of general circulation in each State wherein the United Surety Company was engaged in business. Said Receivers shall also mail printed copies of this Order to all creditors of said Company, and to the holders of its bonds, policies and guarantees, and to the beneficiary thereof so far as the addresses of said creditors and holders and beneficiaries are ascertainable from the Company's books; also to the Courts in cases where such bonds or guarantees were issued under the direction and subject to the approval of such Courts; but the non-receipt of such printed copy shall not affect the validity of this Order.

CHAS. W. HEUISLER

STATE OF MARYLAND,
City of Baltimore, ss:

I, WILLIAM M. CARSON, Clerk of the Circuit Court of Baltimore City, do hereby certify that the above is a true copy of the original order now on file in this office in

the cause therein entitled Thomas H. Bowles, et al, vs. United Surety Company, et al.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said CIRCUIT COURT, this 11th day of October, 1912.

WM. M. CARSON, Clerk."

That was taken on appeal to the Court of Appeals.

In the record in case of Vandiver vs. Poe, appears an (101) order of publication dated 24th day of January, 1911, about ten days after the receivership. (Reading.) That order was transmitted by the receivers to the holders—not only the creditors but all the holders of bonds and policies, as many as we could get in touch with. We conceived it our duty to send it to everyone interested in the company, all policy holders, and published it in the newspapers. That is the ordinary notice to creditors.

Q. That was sent also to bond holders and policy holders upon the theory that the receivership cancelled their bonds, or if not, that upon seeing that notice they themselves would cancel their bonds, wasn't it?

The Court: I think such a notice as that would be proper to be sent to anybody who might have any conceivable claim.

Q. As the result of all these efforts can you tell us to what extent the outstanding insurance was reduced? Well, we will say within two years after the receivership.

The Court: Of course in two years you will assume that an insurance company perfectly solvent which stopped business and did not re-insure in two years time there would be reduction in the outstanding policies apart from any action on anybody's part. I do not see (102) how are you going to separate them.

Mr. Cabell: You can tell that on the books of the company. Show the returned premium paid, and that showed what did run and what did not run out.

The Court: That is true but somewhat rough.

Q. (By Mr. Marshall) In answering that, would you put it under the head of Fidelity, Surety and Burglary? A. I have December 31st, 1911.

Q. I am referring to the period that is covered by the record in the Vandiver case in the Court of Appeals which refers to a reduction from approximately $70,000,000 to $9,000,000. A. That was not in the Vandiver case. From the record in this case I can tell you to what they were reduced in one year.

Q. Give us that. A. As of Decceember 31st, 1911, we have as follows: Fidelity $73,550.

Q. As compared with $12,000,000. A. Yes, premium $284.97.

Q. As compared with $46,000. A. Yes; Surety, $18,350,604 with gross premium amounted to $117,874.78, and Burglary outstanding $4,428. This was annual business.

The totals, as I have made them out, showed that on December 31st, 1911, outstanding in all three classes, Fidelity, Surety and Burglary, $18,876,989, as against $61,268,458 the previous year, December 31st, 1910, and the premium accounts total December 31st, 1911, $111,(103) 936.98 as against $345,529.92 the previous year. That is the premium apportioned to that business. I suppose the calculation is correct. The only other character of insurance we had outstanding as of December 31st, 1911, was plate glass $165. So then everything was out of the way.

The excise business was settled before the receivership.

The Court: Everything was left but what you call the surety business and claims in the cases in which losses were made or claimed.

The Witness: At the expiration of the next year there was approximately nine millions of dollars of bonds outstanding of all kinds.

Q. Isn't it a fact that practically everyone, or cer-

tainly substantially all, of the sound risks went out of the United Surety Company during this period as the result of cancellation or lapse or otherwise? A. I could not say that, no. For example, the claim reserve set up by the receivers, when they got into the situation, shows that they admitted the liabilities to be on the books—at that time December 31st, 1911, was approximately $464,000. That, therefore, represented our estimate of (104) what the liability would be on bonds on which claims had been made up to that time. Now therefore there was still outstanding some nine millions of dollars of bonds and the total losses that have altogether materialized only amounted to $563,000 and consequently that would hardly be borne out by the facts.

The Court: On this nine millions of outstanding insurance so far as you now know the claims only amount to a hundred thousand dollars—

The Witness: Yes, I think that is true although that might not be altogether accurate. In other words our estimate made December 31st, 1911, might have been high or low and these losses therefore might have been a little more or less.

The Court: But you think on the whole of this nine millions of dollars of outstanding at that time resulted in a loss to you not much above a hundred thousand dollars.

The Witness: I do not think it amounted to that much.

We had a joint conference to discuss the reinsurance (105) of the United at the offices of the United Surety Company with Mr. Bland, President of the United States Fidelity & Guaranty Company, Mr. Warfield and Mr. Whelan, representing the Fidelity & Deposit Company, Mr. Stone representing the Maryland Casualty Company —I am inclined to think there was someone from the American. They were all brought together. The effort was to work out a theory or possibility of re-insuring this Company. It never reached the stage of any bargaining because after careful consideration of the matter

and talking about it all the companies united in saying that they would not take the underwriting as it stood at any price. They would take selected risks. They wanted the plant and agency force, would like to get that business, but they would not take the general business of the Company without examining each and every bond. We even went further than that with Mr. Stone and he got Mr. Highland Burns, who is now president of the company, to spend three or four weeks going over the risks of the United Surety Company and he gave it up and said they would not take over the bonds. They examined the individual underwriting. The others ex-
(106) amined the individual underwriting, but they said they would not do it without selecting or rejecting whatever they choose. We said what we want to do is to reinsure the outstanding risks. How can that be done, how will you propose to do it. They looked upon this as an important thing, the failure of a surety company in Maryland, and we thought they would save the situation in some way. We neveer could get anything practical. On Friday afternoon, December 23rd, 1910, the representatives of the National Bank Audit Company visited Mr. Bowles, said representatives being W. Barrett Ridgely and others. It has been a good while, but that latter fell down for several reasons. I think probably the filing of the Preston bill might have had something to do with it but it would have fallen down anyhow because the National Bank Audit Company could not carry out any proposition.

The statute in Maryland provides that no surety company can do business unless it has assets over and above all liabilities equivalent at least to the full par value of its stock. Consequently if the assets after charging reserve premiums and claim reserves are less than the full par value of the stock the Insurance Commissioner under
(107) the law has to close it up and stop it writing. I think it is a quite usual course. That is what we call insurance insolvency. It is an impairment which requires an order from the Commissioner when he discovers it that you must not write any more business until that impairment is gotten rid of. At the time of the original proceedings we were impaired too, charging off our stock's obligation. We were solvent on the books. If you take into account that the building was sold at a

loss of $150,000 over what it was carried at and the Baltimore City stock which sold at a loss of $50,000,—

Q. That is after history. I am trying to get the working of your mind at that time and not the development after that. It is according to the law as to whether certain assets are to be taken into this calculation that determines impairment, isn't it? A. I think not; I think it is more a question of the demand of the Insurance Commissioner.

Q. Isn't it a fact that in every case the law specifically states what shall be considered an asset and what is (108) not an asset? A. Yes, it cannot carry premiums as assets if over 90 days over-due.

We never could get far enough to make an offer of a premium for the re-insurance. I do not recall any negotiations with any New York parties in regard to this matter. Before the receivership we were dealing with the Bank Audit Company. I think they were from St. Louis, though I am not sure.

I have given you all of my recollection as to anybody we were dealing with in connection with the re-insurance We dealt with every surety company in Baltimore. We took it up with the local companies who are the largest in the United States. We also had it up with this Audit Company. I think the importance of that is perhaps a little exaggerated. I think it did not materialize because I think they had nothing. I frankly don't remember taking it up with anyone else. As a matter of fact, we had in our estimation, based on our books assets at that time, set up our premium reserve which indicated the unearned part of the premiums. We had set up the loss (109) reserve which were losses estimated on information we had with respect to each one. We had our bank balances and we had our other property. We were impaired at that time so far as capital was concerned. We said to these Baltimore people, "Will you take over this whole matter and re-insure this business and make us a proposition," and they looked at it and said, "We won't take over your business on any terms." They said the only way which they could think of re-insuring was by selecting the risk That was the basis of their statement and then we had to pay for that and we were

left with the bad risks and no money. Now Mr. Burns went to the trouble at the request of Mr. Stone to spend quite a time in going over these risks.

Q. (By Mr. Cabell) Can you tell the court as to whether all the outstanding claims against the United Surety Company had yet been settled? I mean been adjusted, are there any other claims that await adjustment? A. There is some litigation pending involving claims against the United Surety Company but full claim for them is made in the account as filed in this case.

Q. You mean if this account is paid in its present (110) state, does that end the relations between the Munich and the United Surety Company? A. No; entirely, for this reason—the contract provides that after the final settlement of each case the Munich would pay us or we would pay them any difference in their favor on final settlement. That means we had here charged a reserve amounting to $186,000 against the contract on account of claims pending in court. If you should pay on the basis of this account as you would have to under the contract if our construction is correct yet afterwards there may be a balance in your favor we would have to pay you on the final settlement—

The Court: Is there anything more he would under any circumstances have to pay you?

The Witness: I think so as the contract says if our reserve was not sufficient the Munich would pay us the difference. In other words, what we have set up in this account is not an actual adjustment of the losses but a reserve—It is an adjustment of all losses except those (111) enumerated on the account and against which the reserve is charged. Since the time of filing the account those have nearly all been determined. There are only three cases, one pending in New Haven and two in our Court of Appeals and before this could come to a decree these would all be decided. In the account that we gave to the Alien Property Custodian as a reserve, there is an item of $186,869.65. They were losses on which the auditor had passed and which the lower court had passed but they were hearing the suit in the Court of Appeals. Our account or report shows that. All

these claims have been adjusted one way or another except three. I think I can tell which of these twenty-odd are open still. J. C. White & Company. That is pending before a court in Connecticut. It has been to the Supreme Court and back and it has finally been won by the United Surety Company in the District Court of the United States for the District of Connecticut, and there are exceptions or an effort made to have those findings changed. Mr. Bartlett is up there attending to it. The losses on that then possibly will be nothing more (112) than the attorney's fees and expenses in the case.

Of the other two, one has been argued before the Court of Appeals. The case of the Sanitary District of Chicago. That is the most doubtful case we have. Instead of $186,000 here on this so far as the reserve now I suppose would be reduced to half or less than half.

Q. The theory on which this account here is drawn is that the Munich owes a third of the ascertained loss of the United to its policy holders without regard to the probability or possibility of an actual payment by the United Surety Company to the policy holders of any or all of that sum. A. The account is made as directed by the contract and we have not conceived that made any difference.

Q. Whether it was directed by the contract or not it is made on that theory? A. It does not enter into the (113) theory at all.

The Court: The account claims that the Munich should pay one-third of what the United Surety Company owed on the bonds written during that five year period. What dividend have you paid, any?

The Witness: Have paid no dividend to the creditors.

The Court: What have you any chance of paying, suppose you did not get anything from the Munich at all?

The Witness: I think we have approximately $16,000 in bank.

Q. How many claims have you paid since? A. $57,000; we got $77,000—we got that from the Munich

The Court: Was it worth while paying these lawyers $8,000 to fight these various claims against you when it did not make any difference so far as I can see in the practical result except perhaps to the Munich what claims they got. They are not getting any very substantial dividend anyhow.

The Court: Leaving out the Munich, how much dividend will you yourselves be able to pay on the accrued (114) claims?

The Witness: $563,000 allowances have been made. We may pay twenty-five cents on the dollar.

All premiums were credited to the Munich but where the premiums proved uncollectable or had been wrongfully charged they were charged off as a return premium and they are also charged against the Munich.

Q. Can you tell me the amount of those figures that were credited first by you to the Munich and then charged back as not being collected? A. Of course the Surety Company followed the custom and the receivers carried it on for a while that whenever a premium came due according to its books and they had not got actual notice of release or termination of liability, they charged the agent with that premium. Then communication would be sent to the agent at the end of the month and he would frequently write back that these premiums were not due because this estate was wound up at approximately the time the premium came due or the work was finished or the receivers were discharged. Then the (115) Surety Company would allow on its books a return premium. Now it sometimes happened also that the man who owed the premium absconded or disappeared and did not have the money. Also a return premium was charged on the books to balance that How many there were that could not be collected or where it was charged off for reasons that it had been wrongfully charged in the first place, I do not know—we made the credit as soon as the premium became due and they charged it on their books to the agents and the Munich received credit for it as the contract provides for on

all premiums charged. It also provides for a charge for all return premiums. I could not give you the amount of the premiums that we charged back because we could not collect them. I think it might amount to a fairly substantiaal sum. Mr. Wagner's report shows that they amount to about seventy or seventy-five thousand dollars. That would be a question of accounting.

Q. (By Mr. Marshall) What disposition did you make of the transactions by which the agents were instructed and authorized by you acting under the order of the court to use premiums in their hands to procure releases of outstanding bonds, what disposition did you (116) make of those premiums? A. At the time of the receivership there were a great many agents throughout the country and those agents felt that their business was the protection of their clients and they had in their hands premiums that they had collected from their clients and customers, amounting to sometimes three or four or five or six thousand dollars and they conceived it to be their right, and we can understand their feeling, to go out and replace that insurance in other companies out of that money they had in their hands because this company had gone broke. Consequently we found that we were confronted with a very difficult situation and we had nothing to do in reality but to acquiesce in that general movement that was going to take place anyhow and secure thereby the release of the liability.

Q. What disposition did you make as between the Munich Company and yourself of those premiums which you used to buy releases? A. I did not buy releases. Here was money outstanding which we could not collect and we secured by giving up the money a release and at (117) the time the release was procured the Munich as well as ourselves was released from liability on the risk.

Q. What disposition as between the Munich and yourselves did you make of that money which is in the hands of the company by being in the hands of its agents for premium purposes, how did you credit or charge it? A. The Munich is charged on the account with all return premiums allowed.

Q. That was charged as returned premiums? A. When they availed themselves of this proposition and paid that money for the purpose of getting a release, getting a new bond for the individual and release our

bond, they were given the credit for the returned premiums.

Q. All of those items that were used in that way for the purpose of buying these releases by the agents are included in this item of return premiums, $167,000? A. All of the returned premiums allowed by the Surety Company in that manner or any other manner are in
(118) cluded in that item.

Q. All of those transactions we have been talking about are here in this item and returned premiums too? A. Yes.

Mr. Cabell: Were your agents instructed or did they so far as you know in any case pay a premium for the release of a policy, that is a sum over and above the actual amount—

The Witness: No, we never paid anything to an agent. The agents all wanted the privilege of using the money in their hands and they were exercising it.

Mr. Cabell: Did they take premiums to give up bonds?

The Witness: I have no knowledge of that, but we recognized no claim for return premium above the amount of the unearned premium at the time.

The Court: What was the book value of the assets of the company at the time it went into the receivers hands about?

The Witness: I think it was seven hundred or eight
(119) hundred thousand dollars.

The estimated value of the property was about $800,000 which included the claim against the Munich for $200,000 at that time.

The Court: Those assets of course look like they might be worth $500,000 or $600,000 as now boiled down, expenses of litigation and so forth being taken out of them, taking out the $73,000 you got from the Munich boiled down to $187,000. You have got $160,000 in hand,

$73,000 of that came from the Munich and taking that off it leaves a net $163,000.

Approved:

STUART S. JANNEY,
R. E. LEE MARSHALL.

DEPOSITION OF ROLAND BENJAMIN, IN NARRATIVE FORM APPROVED BY COUNSEL FOR THE RESPECTIVE PARTIES.

(120) Filed 1st February, 1923.

ROLAND BENJAMIN, a witness of lawful age, produced on behalf of the complainants, having been first duly sworn to testify the truth, the whole truth and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. Janney:

I am Treasurer of the Fidelity & Deposit Company, and have been so for about five years. I was Comptroller and Assistant Treasurer before that. I have been in the surety business over sixteen years. I have been connected with the Fidelity & Deposit Company during all that period. I am familiar with the accounting systems of surety and fidelity companies, and my department is that of accounting. I have under my jurisdiction all the accounting books and records of the company, and I am familiar with the terminology used in the surety trade and business.

(121) Q. We are dealing in this case with a reinsurance agreement or participation treaty, and the contract in the case provides that there shall be an account of the business made at the end of stated periods, and in that account there shall be credited as income various items of income, and shall be charged as disbursements, various items of disbursements. Among those listed as to be charged is the item "Return Premiums and rebates." Will you tell me whether those words have any

technical significance in the surety business? A. Well, the word "rebate" is obsolete. That is a term which seems to have been used for years and years in the insurance business, but as a matter of fact there are no rebates today. I think that the laws of all the states prohibit rebates and there is no such thing as a rebate. A return premium is a premium which is charged back against the original premium charged— I might say against the premium charged, not necessarily "original" because "original" is the technical term, meaning the first premium, but it is the premium charged back to be either returned to the assured or in the case of an uncollectible premium charged back to reverse the premium charged. I think that significance of the term is gen-
(122) erally accepted in the surety world. That interpretation of the word is generally accepted and I know it is accepted in the case of reinsurance agreements with treaty companies.

CROSS EXAMINATION.

By Mr. Marshall:

I have never seen the contract which forms the subject matter of this suit, that is to say, the contract between the United Surety Company and the Munich Reinsurance Company.

Q. That contract, it is agreed, is not a reinsurance contract technically speaking, but is in a sense a partnership contract between the two companies, the substance of which is that the United Surety Company shall transact and manage the business to be conducted under the contract free from any interference by the Munich Company, and that the Munich Company shall participate in the business in this way, that at the close of each annual period an account shall be stated showing the results of the business for the year, that the Munich Company shall
(123) contribute one-third of the loss, if any, incurred during that year, and shall receive one-third of the profits, if any, for the business done during that year. That is not a reinsurance contract, is it? A. That is what we call a reinsurance contract with a treaty company. I am familiar with similar contracts, not this particular contract but similar contracts in which a profit-sharing agreement enters into it. As a matter of

fact that treaty, which we call treaty reinsurance contracts have that clause in them in which they participate in the profits and losses, that is of reinsuring companies.

Q. Isn't it a fact that a reinsurance contract technically speaking is a contract whereby the reinsuring company participates in certain designated lines of insurance, or in certain designated risks? A. That is true, too, but your treaty contract will cover—I don't know anything about this contract, but all of our treaty contracts cover certain specified lines and of course as to a (124) particular individual reinsurance agreement that covers only the particular risk that is intended to reinsure.

After reading the contract, I would say that with some few exceptions this is the general form of a treaty contract, treaty reinsurance contract. In most treaty contracts a specific rate of commission is allowed by the reinsuring company, rather than as in this case, as I take it, they are allowed one-third of the commission paid to the agent. In other words, if you pay twenty-five per cent commission to an agent you would charge the Munich with one-third of that, whereas in the case of most treaty reinsurance contracts a specific rate of commission is allowed rather than one-third of the commission paid.

Q. Apare from any question of custom or practice, what is technical meaning of the term "return premium"? A. The technical term?

Q. Yes, apart from any question of custom or practice. A I do not see how you could separate them.

Q. Isn't it a fact that it is true in a technical sense (125) that the term "return premium" means that portion of a premium that is returned to the assured upon the cancellation of an outstanding bond or policy? A. I should say yes in a technical sense, but the custom of insurance companies with return premiums cover not only the amount returned to the assured, but also premiums which for any reason are uncollectible. In other words, return premiums in insurance accounting is just the reverse item to premium charged. As a matter of fact, the charge under the head of "Return Premiums" of an uncollectible premium is a return premium, for this reason, that if you charge off a premium you have cer-

tainly charged a man with something that you are unable to collect and then you return it.

Q. Who do you return it to? A. As against the account to which you charge it.

Q. To whom do you return it? A. To no one, be-
(126) cause you never got it.

Q. What you are now referring to is not in a technical sense a return premium, but an uncollectible premium? A. Just what do you mean by "technical sense?"

Q. I mean the term "return" indicates, if it indicates anything, the actual return of a premium to some one? A. Correct.

Q. The description which you gave embraces not a return to anybody, but a charge of something that can not be collected? A. This is correct.

Q. Therefore when you include under the term "return" an uncollectible premium you are extending the term "return" to include uncollectible? A. That is the generally accepted meaning of the term "return premium" in insurance accounting or in insurance agreements, etc.

Q. When you say that, do you know whether or not that is the legal acceptation of the term "return
(127) premiums"? A. I don't know anything about the legal end of it. All I know is how it is generally regarded by insurance companies.

Q. As a matter of fact, is it true that the practice of insurance companies in charging off uncollectible premiums, under the head of return premiums, is for the purpose of avoiding local taxation in various states, which is imposed upon premiums, outstanding premiums? A I can not say that. In most states return premiums are allowed. In some states they allow you what they call a flat return premium or a flat cancellation, which would mean the return premium for the full amount of the premium charged, and I think you will find most of the laws read they tax on premiums received. We always regard that where a premium is not received as not being subject to taxation, and I think this is the generally accepted handling of such premiums by other companies.

Q. Isn't it true that in many states premiums which are credited on the books of the surety company even
(128) though not collected are subject to taxation, so

long as they stand on the books as premiums? A. So long as they stand on the books as premiums, yes, but if they are canceled flat—

Q. I am not talking about that. A. As long as they stand on the books as premiums you have no counter charge against them, they have to be taxable and so returned.

Q. Isn't it true then that the practice of treating uncollectible premiums as return premiums is for the purpose of avoiding the state taxation on premiums that can not be collected? A. No, I do not so understand it. When you charge up the premium you have an item on your books of an outstanding premium. If for any reason this is uncollectible the only entry through which you can remove this charge is by reversing your original entry, in which case you would credit the return premium.

Q. So in other words, you include under the general head of "return premium" two separate and distinct (129) classes, one premiums which are in fact returned to the assured upon the cancellation of an existing policy, and, two, premiums which are cancelled off as uncollectible? A. Yes.

Approved:

STUART JANNEY,
R. E. LEE MARSHALL.

STIPULATION AND AGREEMENT AS TO FACTS.

(130) Filed 13th January, 1923.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,
Complainants,

vs.

Munich Reinsurance Company, a corporation, and Francis F. Garven, Alien Property Custodian,
Defendants.

STIPULATION OF COUNSEL.

It is stipulated and agreed by and between the solicitors for the respective parties that the facts hereinbelow set forth, the original papers and printed records and the opinions of the Court of Appeals of Maryland, in the Court proceedings herein referred to, may be considered in evidence and may be considered by the Court and referred to by counsel in the trial of the above-entitled cause, or on any appeal of said cause by any party hereto.

1. On December 24, 1910, a suit was instituted against the Surety Company by James H. Preston in the Circuit Court No. 2 of Baltimore City, praying that a receiver be appointed and that the Company be dissolved as an insolvent corporation; that the Bill of Complaint in such proceedings alleged as follows:

"2. That the United Surety Company is a corporation incorporated under the laws of the State of Maryland, by the Act of Legislature, 1902. Chapter 479, for the purpose of engaging in the business of becoming (131) surety on bonds of various kinds, and for other purposes, with its principal office in Baltimore City; as will more fully appear by reference to said Act.

"3. That since its incorporation, the said United Surety Company has been in the business of becoming surety on bonds in Baltimore City, and elsewhere; but the said Company has suffered great impairment of its capital from various causes, to such extent that its capital is not now sufficient to entitle it to do business under the Laws of Maryland; that its business is now being conducted at a loss, and there is no prospect of its being able to continue in the business, and the longer it is allowed to continue, the worse it will be for its creditors and stockholders.

"4. That in the early part of this year, its condition was so precarious that its right to do business had been revoked in one State after another by the Insurance Commissioners thereof, and receivership was at that time thought to be imminent, but a strong effort was made to

rehabilitate the Company in the hope that it could go forward successfully. That hope has not been realized, and it is now impossible for the Company to continue in business, and it is also impossible to get the stockholders to agree upon any plan for liquidating the affairs of said corporation out of Court.

"5. Upon information and belief, your Orator charges that said corporation, the United Surety Company, is insolvent."

II. On June 5, 1911, the Surety Company filed a Demurrer and Answer to the said Bill of Complaint, alleging in part as follows:

"4. In paragraph 4 of the Bill, the Complainant inti-
(132) mates, and would have the Court believe, that this Respondent's license to do business has been revoked in *many* states during the past year, whereas, the same is not true, and in answer thereto, this Respondent states that during the year 1910, its license has *only* been revoked in three States, to-wit: the States of Massachusetts, New York and Minnesota, whereas, it has constantly been doing business throughout the entire year of 1910 in the following *thirty-three* States, to-wit:

1—Alabama
2—Arizona
3—Arkansas
4—California
5—Colorado
6—Connecticut
7—District of Columbia
8—Florida
9—Georgia
10—Illinois
11—Indiana
12—Iowa
13—Kansas
14—Kentucky
15—Louisiana
16—Maryland
17—Michigan
18—Mississippi
19—Missouri
20—Nebraska
21—New Jersey
22—North Carolina
23—North Dakota
24—Ohio
25—Oklahoma
26—Pennsylvania
27—Rhode Island
28—South Carolina
29—South Dakota
30—Tennessee
31—Texas
32—Washington
33—Wisconsin

That the license which were revoked in the States of Massachusetts, New York and Minnesota were re-
(133) voked under certain then existing conditions, and not because the Company was insolvent.

"5. And this Respondent categorically and emphatically denies the allegation of the fifth paragraph of said Bill of Complaint to the effect that this Respondent is insolvent, and charges that said allegation was made and sworn to by the said Complainant with full information and knowledge that it was untrue, and that so far as having information that it was insolvent and believing the same, this Complainant on the very day he swore to said Bill, to-wit: December 23rd, 1910, and on the day previous thereto, was apprised as to the financial condition of this Respondent, showing assets largely in excess of liabilities, including therein all proper premium and claim reserves, and also was informed of the cash in bank to the amount of over $130,000,000, and of other figures showing its solvency, and then and there said Complainant, the said James H. Preston, expressed his individual and personal belief in the solvency of this Respondent Company; and this Respondent believes, and charges that said Complainant has not had, and could not now properly have, any other or different information with reference thereto; and this Respondent further shows, that it is now, and for a long time has been, lawfully conducting its business of Surety, Fidelity, Burglary, Plate Glass and Casualty Insurance in said thirty-three states of the United State, employing several hundred agents and employees in said work, and that it has at all times throughout the year 1910, and previous years, and ever since its incorporation, been able to pay, and has paid, its debts, and all proper and lawful claims against
(134) it in the proper and usual course of its business, and is now able to pay its debts in the usual course of business, and is meeting every proper lawful demand and claim made upon it, in due course, and when properly due and payable; and that there is no possible foundation for said allegation made by said Complainant, which cannot fail to be most disturbing to its policy-holders and agents.

"Respondent further answering paragraph 5 of the Bill, in this connection, states:

"(1) That it had One Hundred and Thirty Thousand, Five Hundred and Fifty-nine Dollars and seventeen cents ($130,559.17) exclusive of interest, in bank at the close of business, December 31st, 1910, besides certain other cash, to which must be added certain amounts netting over Fourteen Thousand Dollars (14,000.00) collected since December 31st, 1910, making a total cash in bank, January 3rd, 1911, of about One Hundred and Forty-four Thousand, Eight Hundred and Fourteen Dollars and seventy-one cents ($144,814.71).

"(2) That it has Baltimore City stock of the par value of Two Hundred Thousand Dollars ($200,000) on deposit with the State Treasurer of Maryland.

"(3) That there was due on December 30th, 1910, to this Respondent Company by its agents for premiums on business actually written, One Hundred and Sixty-four Thousand, Two Hundred and Thirteen Dollars, less agents' commissions amounting approximately to $52,548.00, leaving a net balance due to this Company from its agents on December 30, 1910, of approximately $111,665 00.

"(4) That this Respondent Company has coming to it a net balance of not less than One Hundred and Forty-five Thousand Dollars ($145,000) from a valid claim esti- (135) mated at over Two Hundred and Forty Thousand Dollars ($240,000), which claim it has against the Munich Re-Insurance Company, a very rich corporation, entirely able to pay, and that the Court of Appeals of Maryland has decided in favor of said United Surety Company its case against said Munich Re-Insurance Company, and that all that is necessary is to finish an accounting already begun to establish the precise amount of said claim.

"(5) That this Respondent Company has other large, and substantial assets, consisting of valuable fee simple real estate, mortgages, bonds and other assets to the estimated value of over Three Hundred Thousand Dollars ($300,000).

"(6) That the total assets of this Company aggregate over Eight Hundred Thousand Dollars ($800,000)

"(7) That this Respondent Company now has a considerable surplus over and above its liabilities, including in such liabilities all proper premium and claim reserves, and not including among its assets many of its so-called non-admitted assets, such as salvage, etc., in course of collection, but which are of great value to the Company, and this Company is therefore not insolvent."

III. On March 6, 1911, after the Court had overruled the Demurrer of the Surety Company, that Company filed its Supplemental Answer in which it alleged as follows:

"That it was not impossible for this Respondent Company to continue in business at the time of the filing of the Bill of Complaint by the Complainant; but, as a matter of fact, it continued to do business as heretofore, after the filing of said Bill, and there were several strong efforts being made to obtain an infusion of capital and to form an alliance with one or more companies at the (136) very time that the Bill of Complaint in this case was filed, and thereafter; but, that these very objects were checked, and probably defeated, by the filing of said Bill of Complaint, and that the filing of the Bill, moreover, caused the Insurance Commissioners of a number of States to promptly revoke the licenses of this Respondent Company to do business therein, and this Respondent believes and avers that this was one of the causes of the revocation of its license to do business in the State of Maryland.

That, moreover, the filing of this Bill almost immediately crippled the business of this Respondent Company; that it caused the public and also its many agents throughout the United States to view it with distrust, and it also prevented the collection of many thousands of dollars in premiums due by its agents to the Company, and therefore greatly embarrassed it financially.

And this Respondent therefore charges that the filing of said Bill was directly, if not indeed entirely, the cause of the stoppage of its business and of the stoppage of the payment of money due to it under claims which it had against various parties; and also put its property and assets in imminent danger and great peril of attachments being issued against it; thus tending to injure the

Company when efforts were being made to save is as a going concern, inasmuch as it had a considerable surplus and then was, and now is, solvent. * * *

That in order to more thoroughly understand the true situation concerning the action of the Complainant and the filing of said Bill, this Respondent sets forth the following facts, which show said motive and the circumstances and conditions under which said Bill was filed:

A Special Meeting of the Board of Directors of this (137) Respondent, the said United Surety Company, had been duly called by the Executive Committee to convene at the Company's principal office, No. 15 South Street, Baltimore, on Thursday afternoon, December 22nd, 1910, at half past twelve o'clock to consider the financial condition of the Company, and to take action with references thereto, a copy of the Minutes of which meeting, duly certified by the Secretary of the Company, is filed herewith, as part hereof, marked "Respondent's Exhibit Minutes"; and the said Complainant was at that time a member of said Board of Directors; and that said Board comprise eighteen members, 14 of whom attended, including the Complainant; that the 14 members of the Board who were present at said meeting of December 22nd, 1910, were as follows: Thomas H. Bowles, George R. Gaither, Edward H. McKeon, Gustav L. Stewart, Stuart S. Janney, James H Preston, Charles B. Brown, Cornelius J. Reilly, N. Winslow Williams, Fred H. Gottlieb, Edwin J. Farber, George Dobbin Penniman, Edwin W. Poe and Robert A. Dibbon, Jr.

That Edwin W. Poe, Esq., the President of the Company, laid before the Board at said meeting a statement of the financial condition of the Company, in which statement he stated that the claim reserve had been increased in accordance with the latest information regarding the claims that had been made on bonds. This statement showed that there was a surplus of assets over liabilities and above the par value of the capital stock of the Company of $250,000 of more than Twenty Thousand Dollars ($20,000), exclusive of a number of assets which were estimated to be worth commercially to the Company about One Hundred Thousand Dollars ($100,000), but which the Company was not able, under the stringent rules of the United States Government, to have allowed as assets in the statement prepared for the Government

(138) for the purpose of doing an insurance business under the Government's rules; but, which were, nevertheless bona fide and valuable assets of the Company.

Upon inquiry being made, the President stated that among these additional assets, not included in the statement, were premiums over 90 days old due by its agents amounting to $82,911.92, as of November 30th, 1910, and other assets.

Other data concerning the financial condition of the Company were also discussed and a full discussion took place among the directors, and some of the directors urged that immediate steps should be taken by the Company, looking toward the winding up of its affairs, and its orderly liquidation while the Company was perfectly solvent, basing the demand for such action upon the insurance business possibilities of the Company, and not doubting in any way its financial solvency; that the Complainant, James H. Preston, engaged in said discussion a number of times, and urged most strongly that there was no immediate reason for the winding up of the Company by any Court proceedings, inasmuch as the Company was not insolvent; that on account of the condition of the Company, such action at that time would be unnecessary and unwise; that, thereafter, a resolution was adopted, appointing a committee of four, consisting of the President of the Company, Edwin W. Poe, Thomas H. Bowles, George Dobbin Penniman and the said Complainant, James H. Preston, which committee was to meet the Presidents of the Fidelity & Deposit Company, the United States Fidelity and Guarantee Company, The American Bonding Company and The Maryland Casualty Company, for the purpose of placing the existing condition of the United Surety Company before those Presidents, and securing, if possible, from them some co-operative plan, under which the affairs of this Com-
(139) pany could be carried on or liquidated without any court proceedings, or the appointment of a receiver, and if possible, in such a manner as to conserve its assets for the final benefit of the stockholders; that after the adoption of said resolution, a further resolution was adopted that the Special meeting of the Board, then being held, should be adjourned subject to the call of the President, in order that a report might be received as soon as practicable, from said Committee, and that after

said report should be made, said Board should then and there act upon such recommendations as it might contain.

That at said meeting of the Board, in response to questions from various directors, the President stated the amount of the gross claim reserve as of November 30th, 1910, the Company's latest statement made up for the Government, to be as follows, to-wit: $335,670.24 less re-insurance amounting to $107,797.89, making a net claim reserve of $227,872.35; that the agents' premiums over 90 days old amount to $82,911.92, and said statement also showed the amount of premiums not 90 days old, due by agents to be $76,528 59; the President also stated that the amount of cash in bank as of November 30th, 1910, was $137,566 64, and that cash in bank at time of the meeting was $137,321.90, and that there was a surplus even on the statement made out for the United States Government of over $20,000, and that this was exclusive of agents' premiums over 90 days old, hereinbefore mentioned, and certain other assets not included in said statement filed, or to be filed with the United States Government; that the attention of the Board was openly called to the fact at that meeting that therefore the Company had a surplus of over $100,000 over and above its capital stock, all of which facts were well known to the Complainant, the said James H. Preston at that time, (140) and were the subject of discussion between him and the other members of the Board; that subsequently, on the following day, Friday, December 23rd, Edwin W. Poe, the President of the Company, George Dobbin Penniman and James H. Preston (the Complainant) together with S. S Janney, representing the other member of the Committee, said Thomas H. Bowles, met Messrs. Edwin Warfield, John R. Bland, George Cator and John T. Stone, the four Presidents of said four Companies, and then and there discussed the financial condition, and the financial statement of the Company of November 30th, 1910, which had been placed in the possession of said Presidents; that said Committee, and said James H Preston, as its spokesman, then and there stated to said Presidents that the Company was solvent as shown by said financial statement, and asked the presidents whether they did not consider that the officers of the Company were justified in continuing to write business in

view of this statement, and said Presidents gave said Committee the unanimous answer that they considered that its officers would be justified in continuing to write business pending further action of the directors; that said James H. Preston then and there stated that he was individually willing to "trustee" his stock, if the other stockholders would consent, under a plan suggested by said four Presidents.

The Committee thereafter adjourned for the purpose of getting an opinion concerning certain legal phases of a possible liquidation of the Company's affairs, and with a view to meeting again to discuss matters and take further action. It was then decided that the Complainant, said Preston, should accompany J. Kemp Bartlett, who acted as attorney for the four Presidents, to the office of said Bartlett in order that he might obtain a copy of the plan suggested by the Presidents, which he did, and he was to submit this copy to said Bowles, the (141) largest stockholder of the company; at the same time it was agreed between said Penniman, Janney and Preston that said Janney and Penniman were to see Bernard Carter, Esq., for the purpose of obtaining Mr. Carter's opinion on certain questions relating to the effect of a dissolution of the Company on the liability under certain classes of bonds in order that the Committee could present Mr. Carter's opinion on this subject to the Board of Directors at the meeting to be held on the following Thursday, or at an earlier date, if possible; that thereupon said Janney and Penniman saw Mr. Carter, and subsequently Joseph C. France, Esq., as Mr. Carter was unable to consider the case. Subsequently, between 5 and 6 o'clock Friday afternoon (December 23rd, 1910) said Penniman saw said Preston and told him that Mr. France was considering the subject and had promised to give an opinion, if possible, on Tuesday, December 27th, or not later than Friday, December 30th. At that time no intimation was given by said Preston that he was considering the filing of the Bill for a receiver.

That on Friday afternoon, December 23rd, the representatives of the National Bank Audit Company visited Mr. Bowles, said representatives being Messrs. W. Barrett Ridgely, formerly Comptroller of the Treasury, and Mr. Wadsworth, his associate, said S. S. Janney being brought into conference with them. These gentlemen

then and there made a proposal of a merger of the United Surety Company with the National Audit Company, the plan of which merger was agreed upon in principle and duly reduced in writing, subject to the Bank Audit Company perfecting its financial plan and subject to the approval of the Directors and Executive Committee of the United Surety Company.

That on Saturday, December 24th, said Janney called up said Preston at 9:30 A. M., and advised him of these (142) negotiations and of their importance to the existing condition of affairs, and on behalf of the Executive Committee asked him to a meeting at the United Surety Company's office to meet the representatives of the National Bank Audit Company at 10:30 o'clock A. M. Said Preston declined to attend any such meeting but gave no intimation that he intended or contemplated filing a Bill for a receiver or had done so. Said Janney at the same time called up said George Dobbin Penniman and invited him to be present at said interview, which invitation was accepted and availed of.

The Executive Committee of the Company, with said Penniman, met on Saturday morning, December 24th, at 11 o'clock and interviewed said Ridgley and Wadsworth. The proposed merger was taken up and fully discussed, and during the discussion the members of the Executive Committee heard for the first time that a Bill of Complaint had been filed by James H. Preston on that morning to have receivers appointed for the United Surety Company. This fact put an end to the conference, and four of the directors, to-wit, Messrs. Stuart S. Janney, N. Winslow Williams, George Dobbin Penniman and George R. Gaither proceeded to the office of James H. Preston for the purpose of obtaining, if possible, the withdrawal of his Bill on account of the great injury which its publication would surely do to the affairs of the Surety Company, and particularly in view of the pending negotiations. The informal committee above mentioned were referred to said Preston's counsel and law partner, S. S. Field, but upon their demand that they should see said Preston personally, they met at a conference which was subsequently participated in by said Field. The Committee found Ernest J. Clark, Esq., at said Preston's office on their arrival, said Clark being

one of the directors of the Surety Company, but said Clark did not remain through the conference.

The Committee set before said Preston and his counsel (143) the present negotiations which were being conducted with the representatives of the National Bank Audit Company and urged upon them the importance of having this suit withdrawn and of the injury which would be done to the United Surety Company and its stockholders if the same were not immediately dismissed. From the beginning said Preston refused to withdraw his suit and the Committee finally proposed to him that if he would withdraw the suit immediately that twenty-four hours notice would be given him before any action would be taken, if any, looking to a liquidation of the Company through Court proceedings by the parties who were at the hearing, or the clients whom they might represent; whereupon said Preston and his counsel stated that the suit would be withdrawn on one of two conditions, either that said Bowles, the stockholder holding the majority of the stock of the Surety Company, should immediately purchase and pay for this stock at par, or else that the Committee present should agree that in the event of a receivership for the Surety Company, the said Preston should be one of the receivers. The Committee upon receiving this reply withdrew from any further negotiations.

Said George Dobbin Penniman also told said Preston, at the interview on Saturday, December 24th, 1910, that the President of one of the Surety Companies had intimated that the proposition of the four Presidents, which has been heretofore referred to, would be very much modified to meet the views of said Thomas H Bowles, and also that negotiations were pending with said National Bank Audit Company and that by either one plan or another the affairs of the United Surety Company would be straightened out."

IV. On January 13, 1911, suit was instituted in the Circuit Court of Baltimore City by Thomas H. Bowles (144) and others, stockholders and directors of the Surety Company, asking for the appointment of receivers to take care of the property of the Surety Company and "wind up its business." The Bill of Complaint alleged, among other things, that the Company was solvent, but

that a technical impairment of its capital stock existed and in consequence thereof the Company had been notified by the Insurance Commissioner of Maryland on January 11, 1911, to cease writing insurance of any character until the impairment of its capital stock was made good.

V. On January 13, 1911, the Surety Company filed an Answer admitting the matters and facts stated in said Bill of Complaint and consenting to the appointment of receivers as therein prayed.

VI. On the same day, to-wit: Jan. 13, 1911, Edwin W. Poe, Ernest J. Clark and Stuart S Janney were appointed receivers of the Surety Company upon the aforesaid Bill of Complaint and Answer.

VII. On January 27, 1911, the United States of America filed its petition in the receivership proceeding alleging the insolvency of the Surety Company and praying the Court to revoke the appointment of receivers and to appoint some other person or persons in their places to represent the United States and other creditors of the Company.

VIII. On February 1, 1911, the receivers answered the petition of the United States denying the insolvency of the Company and submitting the petition of the United States to the determination of the Court.

IX. On February 6, 1911, the receivers petitioned the Court, reciting that there was due to the Surety Com-
(145) pany the sum of One Hundred Sixty Thousand One Hundred Seventy-six and 39/100 Dollars ($160,-176.39) from agents of the Company throughout the United States on account of premiums on bonds written by them for the United Surety Company, some of which money the agents had actually collected and the balance being charged against the agents on the books of the Surety Company, but uncollected; that, because of the desire of the agents to protect their customers, the collection of said accounts would be difficult and would cause loss and expense to the assets of the Company, and the receivers requested authority to authorize such agents to pay the proper amount of return premiums on

bonds which might be submitted to them for cancellation out of the funds in their hands, returning such bonds to the receivers to make the termination of their liability thereupon. Upon such petition, the Court passed the following order:

"ORDERED this 6th day of February in the year 1911 by the Circuit Court of Baltimore City upon the aforegoing petition and affidavit that the Receivers in this case be and they are hereby authorized to instruct agents of this Company having balances in their hands to take up bonds or policies outstanding in their territory and to pay out of such balances the unearned premiums on account of such bonds or policies, and upon receiving evidence of the cancellation of such bonds or policies the Receivers be and they are hereby authorized to allow credit to the agent on account of the amount due by him to the United Surety Company for the amount of such unearned premiums paid.

(Signed) CHAS. W. HEUISLER."

X. On April 10, 1911, the receivers filed their petition reciting the dismissal of the dissolution proceedings hereinafter referred to and alleging as follows:

"That such being the status of the said United Surety Company, the defendant in this cause, your petitioners are advised that it is their duty and should be their aim to immediately proceed to wind up and close the affairs of the said United Surety Company, of which they are Receivers and to consummate such winding up under the direction of this Honorable Court.

That in order to best accomplish this result your peti- (146) tioners have examined carefully the affairs of the said Company and find that all of the burglary, accident and plate glass policies and fidelity bonds issued by the said United Surety Company will be cancelled or lapsed during the year which will follow from the time when this Company stoppeed writing any new business, namely, January 13, 1911, and your petitioners pray as to said policies and bonds that they may be authorized to proceed to cancel or lapse the same as they respectively mature.

That the remaining risks written by the said United Surety Company, and which were outstanding at the time of the appointment of your petitioners as receivers, are known as surety bonds; the term "surety" embracing those bonds guaranteeing the fulfillment of contracts of various kinds, bonds executed in judicial proceedings, and those covering public officials, the amount of premiums charged on the above class of risk for the year 1910 amounting to about the sum of $253,600.00 net, less cancellations, rebates, and reinsurance.

That your petitioners are satisfied that most, if not all of said bonds are continuing obligations of the said United Surety Company, but in the opinion of your petitioners about fifty per cent of the Company's liability under its said surety risks will naturally terminate during the present year, whilst the remaining fifty per cent. will represent obligations which will exist for varying periods according to the respective obligations of the bonds,—a very large number of which continuing bonds are covered by annual premiums, which are or will be due and owing to the said Company for said bonds.

That your petitioners are of the opinion that they should immediately proceed to collect the annual or re-
(147) newal premiums due upon all of said bonds from the parties for whom the United Surety Company is surety; but at the same time your petitioners should be authorized on behalf of the said Company, to waive the collection of any such annual or renewal premiums, or any part thereof, from the said parties in the event of a cessation of liability to the United Surety Company through the ordinary termination of the risk, or through a valid release of liability to the said United Surety Company on said bonds.

That your petitioners are of the opinion that by this method of adjustment, a very large percentage of these risks can be cancelled or released within a short period of time. And your petitioners therefore pray that an order may be passed by this Honorable Court authorizing them to proceed to collect the annual premiums due upon said bonds and giving them authority at the same time to accept a cancellation of said bonds and a release from all liability upon the same in lieu of the annual paments

which are due and which may become due on said continuing obligations of the said United Surety Company."

On the same day the Court passed an order in accordance with such petition.

XI. On December 21, 1911, the receivers filed their petition reciting the execution of judicial bonds of every description the same constituting a contingent liability of the Surety Company; further alleging their belief in the solvency of the estate but requestng the Court, because of the Company's inability to furnish protection in the quick adjustment in payment of losses, to order all persons bonded by the United Surety Company, in the Circuit Court, to file bonds in substitution for the bonds of the United Surety Company, and further requesting an order on the receiver to furnish to all other courts (148) where bonds of the United Surety Company are in force, a list of such bonds, with the request that the Judge of said court require substituted bonds for the bonds of the Surety Company.

And the court, on the same day, passed its order accordingly.

XII. On January 19, 1912, the receivers filed their report covering the period from January 13, 1911, to December 31, 1911, reciting that as the Company was neither dissolved nor insolvent, its outstanding liabilities remained in force, and the receivers have attempted to accomplish the following:

1. The termination of liability on outstanding bonds by cancellation, expiration or substitution.

2. Collection of all premiums when and as due. Further that the agents had been notified of the court's order to cancel bonds and settle unearned premium claims out of money in the hands of the agents. Further that the receivers had mailed notices to the principal and obligee on bonds of the Surety Company notifying them of the receivership of the Company and of the time for filing claims against the Surety Company. The receivers

recited that the outstanding contingent liability of the Company, as of December 31, 1910, was as follows:

	Liability	Premium	Reserve
Fidelity	$12,656,672	$ 46,992.36	$ 23,512.03
Surety	40,924,470	239,582.18	129,129.68
Burglary	7,687,316	58,955.38	38,276.07
Accident	8,179,240	44,579.45	22,289.72
Plate Glass . . .		30,035.02	15,164.80
	69,447,698	420,144.39	227,372.30

Further, that the contingent liabilities as of December (149) 31, 1911, were as follows:

	Liability	Premium	Reserve
Fidelity	$ 73,550	$ 284.97	$ 142.48
Surety	18,350,604	107,874.78	57,758.28
Burglary	442,835	3,777.23	2,310.98
Plate Glass		165.50	82.80
Accident			
	$18,866,989	$112,102.48	$60,294.54

The report further alleged that it was the belief of the receivers that the estate was still solvent.

XIII. Stuart S. Janney, one of the receivers, in the course of his testimony on January 27, 1912, in the receivership proceeding testified as follows:

That he was one of the receivers from the beginning. That the receivers have proceeded as energetically as possible in the collection of all outstanding assets of the United. The premiums which were outstanding were a source of anxiety to the receivers as the agents were reluctant to pay over the premiums to the receivers because they felt they should protect the policy holders to whom they had sold policies, and it was doubtful in their minds what was the effect of the receivership upon the outstanding policies. The policy of the receivers has been to cancel, as far as possible, the outstanding contingent liabilities. The Court passed an order giving

the receivers permission to cancel all outstanding risks and to collect premiums where cancellation could not be had. We took the position not to counsel anyone to hold (150) bonds of the Surety Company if he was willing to surrender, paying the premium to the day of surrender. We have even urged them to take that course. The order of the Court directing the filing of claims against the Surety Company has been published in all states where the United did business and in addition to that, a circular or printed notice has been sent to every principal and every assured on every bond that was carried on the books of the United.

During the year from Dec. 31, 1910, to Dec. 31, 1911, as a result of the receivers' efforts, the contingent liabilities have been reduced to $50,580,709.00. The contingent liability on December 31, 1910, amounted to $69,447,698.00, and it was reduced in the course of that year to about $19,000,000.00. It is being reduced every day. The receivers instituted a thorough investigation of all claims pending against the Company and on June 30, 1911, set up a reserve which, in their judgment, was ample to cover those claims and cancel futures. The reserve which the receivers set up exceeded that theretofore carried by about $160,000. During the year of the receivership $93,942.93 of claims have been settled.

Every settlement of claim was passed upon by the receivers and by the special auditor and also approved by the Court. All of the settlements were obviously to the advantage of the property and all interested in the property as creditors or stockholders, unless the Company is far more in a state of insolvency than is claimed by the Government.

No settlement has been made at a figure in excess of 75% of the admitted claim except in one or two instances.

The assets of the Company as of December 31, 1911, include:

Office building valued at around $250,000.00, though (151) I doubt whether the receivers, in liquidation, will receive that much for it.

Baltimore City stock at 95½. It is carried in the statement at par.

The item of collateral loans of $11,581.16 contains one item which is a loan to Mr. Locke of New York, which

the receivers considered should be paid on account of the Knabe advances.

The Munich claim is carried at an estimated value of $200,000.00. The account of the American Audit Company as filed in the case between the United and Munich does not include reserves. If you actually put in the reserves the total claims of the receivers against the Munich to December 31, 1910, for $215,211.88, estimating from December 31st by the increase in reserves and also including the $93,000.00 which we have paid in settlement of losses, you will have a gross increase in the claim against the Munich of not less than $71,000.00. It will be further increased through cancellations, through return premiums of some of the policies which stood on the books of the Company at the time of the receivership. To what extent, however, we cannot say now. The Munich are contending for a reduction of the claim to exclude interest and to allow them a credit for good will.

It is very difficult to say what is the value of the Munich claim to this receivership. We must consider the character of the contract that we have with the Munich. The actual amount which the Munich have to pay the receivers in the end is not determinable until all claims are adjusted; in other words, if, in the course of the settlement that we make we save $200,000.00 on (152) the reserve, which I think we will do ultimately, the Munich Reinsurance Company will owe us $66,000.00 less, so it is varied in accordance with the estimates. If you raise our reserve then you raise our claim. It is not a fixed asset; it is merely a guarantee of what we are estimating as a liability.

(The witness then discussed the pledge of the Munich claim to Messrs. Knabe).

The premiums due from the agents after deduction of commissions amount to $111,799.17. There is an offset, return premiums due agents, amounting to $42,000. The amount of the premiums which will be collected is a matter which is purely estimate. We are less liable to collect them fully than a going concern and it may be attended with some more expense.

Furniture and fixtures are valued at $5000.00.

The amount due as accrued interest speaks for itself.

Due by the United States Government $1500.00, which I don't expect we will ever see.

They are all the assets that we claim.

There are other assets, such as salvage and from second mortgages which we have taken as salvage.

They are not tangible enough to put in a statement.

The total of the assets amounts to $787,931.00.

The liabilities of the Company are as follows:

The premium reserves are fixed at $60,094.54, as required by the statute, same being 50% of the annual premium.

We have reserve for losses which is altogether a
(153) matter of estimate.

Claim reserve amounts to $481,254.01.

The Company sent out checks for bills just prior to the receivership, amounting to $2,218.96.

To other companies for reinsurance	$ 3,434.16
To agents for return premiums, less commissions	43,771.66
To individuals for return premiums	2,427.11
Attorneys' fees mostly before the receivership	6,094.86
Open accounts	2,831.64
" " disputed	1,627.91
Insurance Department futures	5,954.01
Reserve for 1912 taxes	5,000.00

On the above basis we have a surplus over and above our liability of $167,822.14.

(Mr. Janney then discussed various Government contracts).

The receivers after carefully considering all claims against the Company representing losses on bonds and policies and otherwise, have set up reserves which they deem absolutely adequate, but it must be borne in mind that in attempting to determine the solvency of the Company, no conclusion can be drawn until all claims which are covered by these reserves are settled. In other words, it is just as necessary to prove that the reserves are adequate or inadequate as it is to substantiate the cash value of the property's assets, in order to determine its real financial condition."

The receivers in such statement use the word "solvency" to mean whether or not ultimately they will pay out dollar for dollar to persons who shall in the future develop claims against the property.

We do not consider that it is fair to the policy holders (154) of the Company that the property should be deemed insolvent as long as its admitted liabilities do not exceed its assets. I do not think the property should be declared insolvent unless its admitted liabilities are in excess of its assets and its admitted liabilities are vastly less than the reserves which are set up. I am of the belief at this present moment that the property will prove to be solvent in the end, and will pay out more than dollar for dollar to every creditor.

The Munich claim is one which rises or falls according to our settlements, and I, personally, would prefer to carry it in reduction of reserve rather than as an asset. It should be in reduction of reserves thus rising or falling with those reserves.

The claim reserve which we have set up is calculated on a 100% settlement—not a 75% settlement of claim.

In making the settlements with claimants at 75%, we tell them that it is our opinion the company is solvent and will pay dollar for dollar.

There is unquestionably involved in this payment something that—in the event that matters should turn out different from the judgment of the receivers and the auditor, and all those who have at this time passed judgment on the Company—there is involved something of a preference in paying 75% to them, and I do not think one would be justified in doing it other than through a clear advantage to all the others in the Company of having a release from the total claim.

If you take the $286,000.00 which we claim the Munich owes us and deduct therefrom one-third of the loss reserve we have set up, then you will have $104,000.00 (155) which the Munich would owe us, which is the amount of our claim; in addition to all futures except participation in the renewal premiums.

From my judgment, as to the amount of reserves which should be taken against claims that have been made and with the premium reserve of one-half of the

premiums received, my opinion is that the Company is solvent.

XIV. On February 2, 1911, the Surety Company voluntarily filed a Bill or Petition which recited the incorporation of the Company, its organization, the reduction of its capital stock in April, 1910, and further stated:

"That on or about the 11th day of January, 1911, the Insurance Commissioner of Maryland notified your petitioner that it should cease to write bonds of every nature and description, and that the capital stock of your petitioner for insurance purposes was impaired on account of the fact that the said Insurance Commissioner would not allow for said insurance purposes, and as a part of the reserves required to be carried by your petitioner, certain assets of your petitioner, and especially the amount due to your petitioner from the Munich Insurance Company upon its contract of re-insurance made with your petitioner. That thereupon the Directors of your petitioner met on the 13th day of January, 1911, and instructed the President of this corporation to call a special meeting of the stockholders for the purpose of determining whether or not, in view of the then condition of the business affairs of your petitioner, a bill for the dissolution of your petitioner should be filed in the manner provided by the laws of this State; and that said Board of Directors, further acting for the protection of the property and assets of your petitioner, and in order (156) to prevent a waste of its assets and irreparable injury to its stockholders, authorized the officers of your petitioner to consent to the immediate appointment of receivers for the property and assets of your petitioner under a bill filed for the purpose of protecting the property and assets of your petition by Thomas H. Bowles and others in this Honorable Court, which cause is now pending, and in which cause this Honorable Court has appointed Receivers of the property and assets of your petitioner.

That in accordance with the direction given by the said Board of Directors to the President of your petitioner, a special meeting of the stockholders of your petitioner was immediately called to be held at the Company's offices in the City of Baltimore on January 27, 1911, for

the purpose of having the stockholders at said meeting determine whether or not a bill for the dissolution of your petitioner should be filed, as authorized by the laws of this State. That due notice was given of said special meeting of the stockholders of your petitioner, as required by laws of this State, and by the by-laws of your petitioner, and that said special meeting of the stockholders of your petitioner was accordingly duly held on said 27th day of January, 1911, at which said meeting there was present and voting sixteen hundred and eighty-seven shares of the capital stock of your petitioner, representing more than two-thirds of the total amount of the capital stock of your petitioner then outstanding. And your petitioner further states that at said meeting a resolution was passed by the affirmative vote of sixteen hundred and seventy-seven shares out of the sixteen hundred and eighty-seven shares of stock represented at said (157) meeting in favor of the following resolution:

WHEREAS, on account of losses sustained by this Company, it became necessary in April, 1910, to reduce its capital stock to $250,000.00; and

WHEREAS, said limited capital, even with the surplus as then allowed by the Insurance Department of Maryland and other States, is inadequate for the purpose of doing the business of this Company on a profitable basis; and

WHEREAS, owing to certain attacks upon this Company and the undue publicity given to its affairs, negotiations looking to the increase of its capital stock to an amount which would insure a profitable return, have failed, largely on account of such undue publicity and agitation; and

WHEREAS, this Company is only allowed to do business in this State by a license of the Insurance Commissioner of Maryland, and the revocation or refusal of such license destroys its right to do business in the State of Maryland and other States where it has been conducting its affairs; and

WHEREAS, by the action of the Insurance Commis-

sioner of Maryland, on or about the eleventh day of January, nineteen hundred and eleven, said Department refused to allow, as part of the assets of this Company for insurance purposes, the very large sum due and owing to this Company from the Munich Company on its Reinsurance contract, which said action has resulted in the technical impairment of the capital stock of this Company for insurance purposes and rendered it impossible for this Company in the future to obtain a license to do business in this State or in other States; and

WHEREAS, the said Insurance Commissioner of Maryland, did, on or about said eleventh day of January, nineteen hundred and eleven, order this Company to cease doing business in this State and thereby stopped its business in all other places where it was conducting same; and

WHEREAS, this Company through its Board of Directors, did immediately comply with said requirements of the Insurance Commissioner, and stopped all of its business, the result of which stopage has been to completely destroy the efficiency of its Agency Department, whereby alone, its business can be conducted, as well as to deprive it of the revenue from new business which is vital for its continuance as a going concern.

NOW, THEREFORE, be it resolved by the stockholders of this Company, in special meeting duly called for that purpose, pursuant to notice given in accordance with the By-Laws of this Company and as required by the Laws of this State, that for each and all of the aforegoing reasons, the affairs of this Company be closed, and that a Bill or Petition for the dissolution of this Company be forthwith filed in the name of this corporation and on its behalf in a Court of Equity in Baltimore City, in which City the principal office of this Company is located."

And your petitioner further states that the reason set forth in said resolution are the reasons why the dissolu-
(158) tion of your petitioner is sought in these proceedings.

And your petitioner files herewith an exhibit, marked "Exhibit petition, United Surety Company", containing first, a full and true inventory of its assets and liabilities; second, a list of all of the stockholders of your petitioner with their respective addresses, and the number of shares belonging to each, and upon which there is no amount remaining due thereon; third, a full statement of all encumbrances on the property of your petitioner; fourth, a full list of the creditors of your petitioner with their respective addresses, and the amounts due each; fifth, a list of certain claimants against your petitioner, with their respective addresses, but your petitioner states that no amount has been ascertained or admitted to be due by your petitioner as to anyone of said respective claims, nor does your petitioner admit that there will be due and owing at any time any specific amount or amounts upon any one or more of the said claims, but that the same are all unascertained, and uncertain as to their right of recovery, or as to the amount to be recovered on the same; but nevertheless, your petitioner states, that, acting in accordance with the requirements of the insurance laws of this state as to reserves against claims, your petitioner has set aside such amounts as in the best judgment of your petitioner are possibly recoverable in any event upon said claims, and for the purpose of meeting the same has established a claim reserve amounting in the aggregate to Two Hundred and Sixty-seven Thousand, Eight Hundred and Thirty-two Dollars and eighty three cents ($267,832.83), which your petitioner believes to be sufficient to pay the sums of (159) money which may be recovered upon such ones of said claims as may be properly presented, and the amount due thereon legally proven and established. And your petitioner further states that there are a large number of bonds or policies of this Company now outstanding upon which there has been no claim whatsoever of any liability presented to your petitioner, and that your petitioner has no knowledge of any default in the same, or of any amount which can be collected for or on account of said outstanding obligations, but nevertheless, as required by the insurance laws of this state, your petitioner has maintained a premium reserve, amounting at the present time in the aggregate to the sum of Two Hundred and Twenty-five Thousand Three Hundred and

Sixty-five Dollars and fifty-three cents ($225,365.53), which sum your petitioner believes is more than sufficient to meet any possible claims which may arise hereafter for or on account of said outstanding obligations of your petitioner.

XV. In an exhibit filed with the aforesaid Bill marked "Petitioner's Exhibit United Surety Company," a financial statement of the assets of the United Surety Company as of January 27, 1911, was set out, from which it appeared that the Surety Company had a book surplus to policy holders as of January 27, 1911, amounting to $304,929.12.

XVI. That the Fidelity & Deposit Company of Maryland filed its petition showing cause why the dissolution of the United Surety Company should not be decreed, setting forth that the Fidelity and Deposit Company had become surety upon certain bonds on which the United Surety was principal, the liability on which said bonds will not mature and will not be capable of ascertainment for several years, and further that the United and the Fidelity had outstanding re-insurance contracts, the (160) liability on which was impossible of ascertainment at that time.

XVII. That the United States Fidelity and Guaranty Company filed its petition showing cause why the dissolution should not be granted and recited the existence of re-insurance contracts between the United and the United States Fidelity and Guaranty Company, the liability on which was impossible of ascertainment at that time, and further reciting that the purpose of the application for dissolution was to distribute the assets of the United among its stockholders.

XVIII. The United States of America filed its petition showing cause why such dissolution should not be decreed, reciting that the Surety Company had written bonds under which the United States of America is beneficiary, and the liability on which is impossible of ascertainment.

XIX. That the American Bonding Company of Balti-

more filed a similar petition showing cause why the dissolution should not be granted.

XX. Edwin W. Poe, one of the receivers of the United Surety Company, testified before Judge Heuisler on March 15, 1911, in the dissolution proceeding. In the course of his testimony he stated:

"Since December 31, 1910, a great deal of our liability has been cancelled. We have been trying to do it gradually. In making such cancellations the Receivers made a bookkeeping entry giving the agents credit for the unearned premium against premiums due by the agents. We have attempted to cancel our obligations by paying the return premiums out of moneys due the Company from our agents. We sent a circular letter when the Court gave us authority, authorizing those agents to (161) distribute any cash of the United that they had on hand and take up the bonds wherever they could. We sent creditors' notice and notice to every bond and policy holder of the Company.

Practically all our agents are indebted to the Company and we have instructed them, out of the amount they owe us, to pay the policy holders their return premiums and we have been crediting the agents' accounts. We have been doing this upon the theory that the Company is solvent and upon an order of Court."

XXI. That Judge Heuisler on March 31, 1911, announced his decision in the dissolution proceedings which was as follows:

"The Bill in this case was filed voluntarily by the United Surety Company of Baltimore City, asking for the dissolution of the corporation. The Bill was filed pursuant to the provisions of sections 51 and 52 of Article 23 of the Code, which provides:

Every corporation of this State, other than a public service corporation, may, by the affirmative vote of a majority of all its members or of a majority of its stock (or if two or more classes of stock have been issued, of a majority of each class) outstanding and entitled to vote, close its affairs and authorize a bill for

its dissolution to be filed in the manner hereinafter set forth."

Under further provisions of the law, there was filed with the Bill of Complaint a statement of the full and complete assets of the corporation, together with a list of its stockholders and their addresses, and also a statement purporting to set out the certain and ascertained creditors.

It was also alleged in the Bill that the Company was *entirely solvent*, but unable because of an admitted impairment of capital stock, and a consequent inhibition (162) on the part of the Insurance Commissioner of Maryland, to further continue its active business. The notice provided by the law was accordingly given, directing that any one interested should, on or before a day certain therein named, show cause why the prayer of the Bill should not be granted. The Fidelity & Deposit Company of Maryland, the United States Fidelity and Guaranty Company of Baltimore City, The American Bonding Company of Baltimore City and the United States of America, by petition or answer, did protest the dissolution of the applicant Company, alleging in substance that, being solvent it could not invoke the provisions of the law of Maryland relating to voluntary dissolution because of the fact that its list of creditors did not fairly and truly represent those whose claims should be properly considered before the assets of the Company could be applied to a final liquidation of its affairs; and asserting that it was legally responsible for the settlement of a certain class of, or character of, indebtedness, of a contingent nature, which must be provided for before the dissolution could be had.

The status of the corporation as contended in these several petitions or answers may be summarized as follows:

A. It had made voluntary application under the provisions of the Act.

B. It had alleged its entire solvency.

C. It had submitted a class of certain and ascertained creditors—

all of which was a proper compliance with the provisions of the law, but—it had omitted the entire class.

D. Of contingent liabilities for which it was largely responsible—

and that unless insolvency was charged and shown as (163) the reason for dissolution, no decree was proper to be passed because the dissolution could not change or impair the outstanding contingent contracts.

The business of the Company extended over a large section of the country, as well as locally, and in the testimony taken, it was shown that in the State of South Carolina, which is the typical character of its business elsewhere, the bonds issued by the Company could be described under a broad division as "Judicial, contract, public official, government bonds, government official bonds, and fidelity bonds for employes", as distinguished from casualty bonds, which are known as accident, burglary, or plate glass risks. (Testimony of Edwin W. Poe, Fol. 39).

It was also shown that certain of the bonds, such as those known as judicial, could not be cancelled or withdrawn at all, but must be allowed to run to the full length of their official life, and that the fidelity bonds contained a provision that the employer had six months within which to discover the defalcation, and three months thereafter within which to bring suit thereon.

The provisions of the Statute are very clear, but the difficulty in the case lies in the application of those provisions to the facts in the case. The applicant corporation alleges its entire solvency and complete ability to meet its obligations, and still its officials testify that it most certainly has assumed contingent liabilties; that it has become guarantor and surety on future liabilities; that it has entered into the re-insurance contracts for a valuable consideration, and that it has absolutely made no provision to care for the ultimate liability which may follow these undertakings.

In reply it contends that the act of dissolution, as such, does not change the position of its creditors; that the fact of contingent liabilities does not make those who (164) may profit thereunder creditors of the Company;

that re-insurance can be effected by all those who may thus be situated, and that if the official life of the Company is terminated, such parties must seek such protection as the exigencies of the case suggest. The Company is willing to surrender its franchise to the State, and asks its acceptance, because it can discharge all its present and discoverable liability and have a surplus over even beyond the full claims of its stockholders.

It is urged that the doctrine announced in the Casualty Insurance Company's case, in 82nd Maryland, 572, is applicable to the facts of this proceeding: The Court there did say, "There must of necessity be many outstanding and unascertained claims pending against holders of the Company's policies, but claims may require some time for adjustment; but it is of great importance that the Company's assets should be distributed at as early a day as practicable, and hence the settlement of its affairs ought not to be postponed to await the determination of every contingency on which its policy engagements are suspended." But the difference in the two cases is so palpable that the application fails. A casualty business alone, as in the 82nd Maryland case, is not the business of the applicant Company. Casualty risks can be promptly handled. If the loss has occurred it can be provided for; if the loss has not occurred new casualty insurance can be readily effected by the assured, and the question of unearned premiums adjusted; but judicial bonds, fidelity bonds, contract bonds, custom and other government bonds, that being the admitted business of the United Surety Company, are not in many instances susceptible of cancellation at all, but must remain effective during their official life, and in other instances cannot be provided for by adequate re-insurance processes until after much time is expended and additional expenses incurred.

It is contended, and perhaps fairly so, that the prin-
(165) cipal obligors may be esteemed entirely able to take care of these various funds, but is it entirely equitable to force the obligee to take that chance? If the obligee is made to take the position now, it could have been done originally without necessity of any bond.

It is urged that under the receivership proceedings in the case of Bowles et al., vs. the applicant Company, a

separate proceeding, that all the outstanding contracts of judicial, fidelity, contract and other insurance, have been rescinded and that the interested parties must now re-insure. But that contention is unsound, because the receivership proceeding is only a caretaking one, and the application for dissolution is made sua sponte by a perfectly solvent corporation, willing and anxious to pay its debts and retire from business. If this Company is solvent and can arrange to pay all its debts and obligations, then under the law it is entitled to a decree of dissolution and its stockholders should receive all the surplus. But if it has outstanding legal obligations which it has made no provision to settle and adjust, if it has sent its obligations out into the commercial world, it must pay or adjust them before any rights of its stockholders can be at all considered. This is the gravely important aspect of the case adverted to in the argument, and it cannot be gainsaid.

It may be urged that the ultimate distribution of its assets, and not its corporate existence, is alone affected by this consideration, but this contention should not be permitted to prevail until it is definitely determined how far the fact of dissolution, as such, may legally embarrass the claims of unascertained and contingent claimants. It is alleged that dissolution does not break or abridge any contracts of the company. That may or may not be (166) so, but it is a fact more easily susceptible of ascertainment while the corporate entity subsists, and the time for speculation in the matter is not at hand.

The position of the protesting parties in interest does not appear to be shaken by legal authority or by the testimony relative to the facts given in this case. It is manifest that the integrity of the general surety business is affected by this proceeding; it is not overstated in the argument that this is a question of general justice and fundamental right and wrong. The conclusion is inevitable that the proper proceeding is to refuse the application for a decree of dissolution and to dismiss the Bill with costs and an Order will be signed accordingly.

(Signed) CHAS. W. HEUISLER."

XXII. Prior to Dec. 31, 1910, the Surety Company was prohibited from doing further business in the State

of Massachusetts by order of the Insurance Commissioner of that State.

Prior to Dec. 31, 1910, the Surety Company was prohibited from doing further business in the State of New York by order of the Insurance Commissioner of that State; and prior to Dec. 31, 1910, the Surety Company was prohibited from doing business in the State of Minnesota by order of the Insurance Commissioner of that State.

On January 11, 1911, the Surety Company was prohibited from engaging in further business by order of the Insurance Commissioner of Maryland.

XXIII. On October 10, 1912, an order of the Circuit (167) Court, passed in the receivership proceedings, at the instance of the Receivers, terminated all liability of the Surety Company upon its outstanding bonds, as of Jan. 13, 1913. Upon appeal to the Court of Appeals of Maryland, this order was reversed and annulled on the ground that the Surety Company was at that time a solvent corporation, and, therefore, was bound to the performance of its executory contracts. (See U. S. vs. 120 Poe Md. 91).

XXIV. On March 16, 1912, the Circuit Court of Baltimore City passed an order directing the State Treasurer to deliver to the Receivers of the Company $200,000.00 of Baltimore City stock on deposit with the State Treasurer for the protection of holders of its policies of insurance. Upon appeal to the Court of Appeals of Maryland, said order was reversed and annulled for the reason set forth in the opinion of the Court of Appeals of Maryland in the case of Vandiver vs. Poe 119 Md. 348.

XXV. Since the appointment of the receivers, distribution has been made by the receivers to the ascertained creditors of the United Surety Company of an amount equivalent to 20% of their respective claims. The remaining funds left in the hands of the receivers (apart from any amount that may be realized in the pending case) amount to approximately $25,000.00, which funds, together with the claim of the receivers against the

Munich Company constitute all of the assets of the United Surety Company available for any and all purposes.

XXVI. The Participation Contract between the parties became effective as of January 2, 1906. The (168) Munich Company, having sought to rescind the contract because of certain fraudulent representations, the Surety Company brought a suit at law against the Munich Company in the Superior Court of Baltimore City to recover an amount claimed to be due under the contract at the end of the first year of its expiration.

On May 29, 1907, the Munich Company filed its bill in the Circuit Court of Baltimore, praying for a decree, declaring the contract null and void, and cancelling it on the ground of fraudulent representation, and praying for an injunction to restrain the Surety Company from further prosecuting the suit at law.

The Surety Company filed its Answer, neither admitting nor denying the allegation of fraud and alleging a ratification and confirmation of the contract in question amounting to a waiver on the part of the Munich Company, and, by way of cross-relief, praying for an accounting and a decree in favor of the Surety Company.

XXVII. On October 30, 1909, the Circuit Court of Baltimore City passed a decree, dismissing the Bill of Complaint filed by the Munich Company and referring the proceedings to an auditor to state an account between the parties as prayed in the cross-bill of the Surety Company.

XXVIII. On May 6, 1910, the Court of Appeals of Maryland affirmed the aforesaid decree of the Circuit Court of Baltimore City and remanded the cause for the statement of the account provided for in the decree of the lower court.

XXIX. In order to facilitate the accounting thus directed, the parties entered into an agreement on No- (169) vember 19, 1910, as follows:

In the

CIRCUIT COURT OF BALTIMORE CITY

MUNICH RE-INSURANCE COMPANY

vs.

UNITED SURETY COMPANY

WHEREAS, in the above-entitled cause now pending in the Circuit Court of Baltimore City, the said Court has, by its decree dated the 30th day of October, 1909, ordered that an accounting be had between the said Munich Re-Insurance Company and the said United Surety Company under the terms of their contract executed in Baltimore on the 20th day of March, 1906, and in Munich on the 10th day of April, 1906;

AND WHEREAS, in order to facilitate said accounting the parties hereto desire to enter into this agreement:

NOW, THEREFORE, IT IS AGREED, between the said Munich Re-Insurance Company, of the one part, and said United Surety Company of the other part, as follows:

First: The said Munich Re-Insurance Company and the said United Surety Company do hereby constitute and appoint the American Audit Company their agent to examine the records, books and accounts of the United Surety Company, and therefrom to state an account in annual periods beginning 2nd January, 1906, and ending on January 1st, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company as per their contract above referred to.

Second: The Munich Re-Insurance Company and the United Surety Company will each delegate one of their employees to assist in such accounting, and all amounts

passed by the American Audit Company, and to which no objection has been raised by either of the delegates shall be deemed to be accepted by both parties, and the fact and amount of any item of receipt or disbursement by said Surety Company as found by said Audit Company shall likewise be conclusive upon the parties hereto, the facts and circumstances surrounding such item (unless agreed to) and the relevancy thereof to the accounting between the two said companies being alone left open for future determination. The audit, however, shall not extend to outstanding liabilities for unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract.

Third: The parties hereto do hereby further agree (170) that, when completed, said account, including a separate statement of any items of receipt or disbursement concerning the relevancy of which there shall have arisen a difference of opinion between the two respective companies, shall be duly signed by said Audit Company and filed in the above-entitled cause, together with a copy of this agreement, and shall form the basis of the Court accounting provided for by the decree hereinabove mentioned.

Fourth: The examination hereinabove referred to shall commence immediately, and the expense of the employment of the American Audit Company shall be borne by the parties hereto in equal proportions, but the portion thereof borne by the United Surety Company shall not be chargeable in the statement of its disbursements chargeable in the account against the Munich Re Insurance Company; and the parties hereto agree to facilitate the examination so that it may be completed at the earliest possible date, and the hearing and determination of the question involved secured without more than the necessary delay.

WITNESS the corporate names of the parties hereto, subscribed by their duly authorized officers, this 19th

day of November, in the year one thousand nine hundred and ten.

MUNICH RE-INSURANCE COMPANY,
By (Sgd.) SCHREINER,
Manager.

UNITED SURETY COMPANY,
By (Sgd.) EDWIN W. POE,
President.

Attest:
(Sgd.) ROBERT A. DOBBIN, JR.,
Secretary.

XXX. The Audit Company submitted its report and the parties then proceeded with the accounting before the Court auditor to whom the case had been referred by the above mentioned decree of October 30, 1909.

XXXI. The Court Audit was filed, and on January 2, 1913, all exceptions taken by both parties to the said (171) order were over-ruled by the Circuit Court of Baltimore City and the order was ratified and confirmed. Appeals were taken by both parties from the orders of the Circuit Court overruling their respective exceptions, and these appeals were finally disposed of by a decision of the Court of Appeals, rendered on June 26, 1913, by which decision the decree of the lower Court was affirmed in part and reversed in part, and the cause remanded to the end that the account be restated in accordance with the opinion of the Court of Appeals. See Munich Re-insurance Company vs. United Surety Company, 121 Md. 479.

XXXII. Thereafter an audit was filed in the Circuit Court of Baltimore City, stated in accordance with the opinion of the Court of Appeals and was ratified on September 26, 1913, and the amounts thus ascertained to be due by the Munich Company as of January 1, 1911, together with interest thereon to September 30, 1913, amounting in all to $77445.79, was paid by the Munich Company to the Receivers on October 2, 1913.

XXXIII. On or about the 5th day of June, 1914, the

Receivers filed a petition praying for an accounting against the Munich Re-insurance Company up to the date of such application, but the Lower Court and the Court of Appeals decided and determined, the opinion of the Court of Appeals of Maryland having been rendered June 26, 1915, that the Receivers in such proceedings were not entitled to the accounting prayed for, for the reasons set forth in Poe vs. Munich Re-insurance Company 126 Md. 520.

R. E. LEE MARSHALL,
Solicitor for Munich Reinsurance Co.

JANNEY, STUART & OBER,
Solicitors for Receivers of United Surety Co.

OPINION OF COURT OF APPEALS OF MARYLAND.

IN THE COURT OF APPEALS OF MARYLAND.

(172) Decided June 24, 1915.

Reported 126 Md. p. 520.

Edwin W. Poe et al., Receivers,

vs.

Munich Reinsurance Company.

Appeal from the Circuit Court of Baltimore City, (Bond, J.)

The facts are stated in the opinion of the Court.

The cause was argued before Boyd, C. J., Briscoe, Burke, Thomas, Pattison, Urner and Stockbridge, JJ.

Joseph C. France and Stuart S. Janney (with whom were Robertson Griswold and Albert C. Ritchie on the brief), for the appellants.

R. E. Lee Marshall, for the appellee.

Boyd, C. J., delivered the opinion of the Court.

This is an appeal from an order dismissing a petition of the receivers of the United Surety Company praying that the papers in the case be referred back to the auditor to state a final account between that company and the Munich Re-Insurance Company, under the terms of a participation contract entered into by the two companies. When the petition was filed an order to show cause was passed and the Munich Company answered, alleging that the Court was without jurisdiction in the premises, and that even if possessed of jurisdiction it (173) should not exercise it until the United Company shall have rendered to the Munich Company the account called for by the contract between the two companies, and until some dispute or difference in respect to such account shall first have arisen.

Controversies between the two companies in reference to that contract were before this Court in 113 Md. 200, and 121 Md. 479. The first was an appeal from a decree which dismissed a bill of complaint of the Munich Company against the United Company, decreed that the defendant was entitled to cross-relief as prayed in its answer, and referred the cause to the auditor to ascertain and report the amount, if any, due by the plaintiff to the defendant under the participation contract. That decree was affirmed and the cause was remanded for further proceedings. The bill alleged that by reason of what was stated in it that contract was fraudulent and void, but that the defendant had instituted an action against it in the Superior Court of Baltimore City to recover $53,968.55 alleged and claimed to be due it under said contract. It prayed that a decree be passed declaring the participation contract null and void, and cancelling the same, that the defendant "be enjoined from prosecuting any suit against your orator based upon said contract, and from asserting in any county any claims or pretensions by reason of said contract"; that an injunction issue restraining the defendant from prosecuting the said suit in the Superior Court, and for general relief. The defendant answered, alleging that in so far as the bill sought to enjoin the suit against the Munich Co., it was

(174) brought with the knowledge of that company and with its acquiescence in that it had voluntarily appeared in said suit by accepting service of summons through its counsel, without which no action could have been maintained against it in this jurisdiction, "and by way of answer to the merits of said bill of complaint and for cross-relief as though the same were prayed by a cross-bill," the defendant answered at length—concluding "and for cross-relief defendant shows that, under said contract, a copy of which is filed with plaintiff's bill as 'Plaintiff's Exhibit No. 4,' plaintiff is indebted to the defendant in a large sum of money, for which this defendant prays an accounting and a decree herein in its favor." The case in this Court was decided May 6, 1910, and on November 19, 1910, the two companies entered into an agreement by which, after reciting that the Court had by its decree of the 30th of October, 1909, ordered that an accounting he had between the two companies under the terms of the contract, and "in order to facilitate said accounting the parties hereto desire to enter into this agreement," it was agreed as follows: "First, That said Munich Re-Insurance Company and the said United Surety Company do hereby constitute and appoint the American Audit Company their agent to examine the records, books and accounts of the United Surety Company, and therefrom to state an account in annual periods, beginning 2nd January, 1906, and ending on January 1st, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company as per their contract above referred to. (175) Second, The Munich Re-Insurance Company and the United Surety Company will each delegate one of their employees to assist in such accounting, and all amounts passed by the American Audit Company, and to which no objection has been raised by either of the delegates, shall be deemed to be accepted by both parties, and the fact and amount of any item of receipt or disbursement by said Surety Company as found by said Audit Company shall likewise be conclusive upon the parties hereto, the facts and circumstance surrounding such item (unless agreed to) and the relevancy thereof to the accounting between the two said companies being alone left open for the future determination. The audit, however, shall not extend to outstanding liabilities for

unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for further adjustment between the parties under the terms of the contract."

Other provisions were made which need not now be referred to. The Audit Company submitted a report and the parties then proceeded with the accounting before the auditor, to whom the case had been referred by the decree. An audit was filed, and on January 2nd, 1913, exceptions to it were overruled and the audit was ratified and confirmed. Appeals were taken by both parties and were disposed of by the decision in 121 Md. 479. On June 26, 1913, the decree was affirmed in part and reversed in part and the cause was remanded, to the end that the account be restated in accordance with that opinion. An audit was filed in the lower Court, which (176) was ratified on the 26th day of September, 1913, and the amount thus ascertained to be due by the Munich Company, together with interest thereon to September 30th, 1913, being in all $77,445.79, was paid by that company to the receivers on October 2nd, 1913.

The participation contract took effect January 2nd, 1906, was to continue for a period of five years from that date, and was to be tacitly renewed for further periods of five years thereafter, unless written notice was given by either party one year previous to the expiration of any term of five years. The Munich Company, however, had the right to withdraw "after the expiration of the first period of five years from this agreement at the end of any calendar year, by giving one (1) year's notice in writing if the transactions under this agreement result in a loss of the 'Munich.' The 'Munich' continuing to participate in all insurances coming within the terms of this agreement, granted or renewed by the 'United' during the currency of any notice of cancelment, and remaining liable for its share of the claims arising out of such insurances, and out of insurance in force at the time of the notice being given until expiration of the liability thereon." (Article XII of agreement).

The bill of complaint was filed by the Munich Company on May 29, 1907, and the first decree was passed October 30, 1909, and affirmed by this Court May 6, 1910. The notice authorized by Article XII was given by the (177) Munich, so as to terminate the agreement at the

end of the year 1910, but neither when the bill was filed nor when the decree was passed were such questions as are now sought to be referred to the auditor before the Court. It will be remembered that the United had sued at law to recover what it claimed was due for the first year of the contract, and by its cross-bill it alleged that "the plaintiff is indebted to the defendant in a large sum of money, for which this defendant prays an accounting and a decree herein in its favor." There was no other prayer in the cross-bill—not even one for general relief. If the case had been determined at any time before January 1st, 1913, nearly five years and a half after the cross-bill was filed, no accounting could have been required of what is now sought to be referred to the auditor, for by the notice the contract was terminated at the end of 1910, and by Article XIII it was agreed: "In case of notice of termination by either party, the accounts shall be made up not later than two years after the expiration of the notice," and the Munich Company would not have been in default for not accounting until that time expired. Of course, a new proceeding would then have been necessary, in order to require an accounting.

There was therefore nothing up to the time of the decree in this Court in 113 Md. which would have authorized the accounting now sought. As will be seen by reference to the agreement between the two companies entered into on the 19th of November, 1910, part of which (178) we have quoted above, the American Audit Company was only authorized to state an account for the five annual periods beginning January 2nd, 1906, and ending January 1st, 1911, and it was expressly stated that, "The Audit, however, shall not extend to outstanding liabilities for unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for *future adjustment between the parties*, under the terms of the contract." Therefore it can not be said that the agreement of November 19th, 1910, authorized an accounting, excepting for those five annual periods which ended on January 1st, 1911. If it be conceded, as contended by the appellants, that the "audit" referred to in what was just quoted above was the one to be made by the Audit Company, that can make no difference. By the next para-

graph it was agreed that when completed said account, including a separate statement of any items of receipt or disbursement concerning the relevancy of which there were differences between the two companies, should be signed by the Audit Company "and filed in the above entitled cause, together with a copy of this agreement, *and shall form the basis of the Court accounting provided for by the decree hereinbefore mentioned.*" That decree was the one of October 30th, 1909, which had been affirmed by this Court. As the account of the Audit Company was to be the basis of the accounting provided for in the decree, can it be doubted that when the agreement said the audit shall not extend to outstanding liabilities for unexpired risks or claims not yet settled, (179) it was intended to exclude those items from the accounting in Court? No valid reason can be assigned for not permitting the Audit Company to include them, if they were to be considered by the Court auditor, but, on the contrary, as the agreement shows a desire to facilitate the accounting, there would have been every reason for having the Audit Company consider them. Moreover, as the account of the Audit Company was to form the basis of the accounting in Court, there would have been nothing for the Court auditor to act on, concerning those items, if they were omitted from the audit of the Audit Company. We can, therefore, have no doubt about it being intended by the parties that those items should be *excluded* from the accounting in Court. But even if that were not so, there is nothing in the agreement to *include* them, and giving the agreement all the force possible, it can not by any proper construction to be placed on it be said to authorize an accounting beyond the five-year period, and that being so, we are forced to look to the cross-bill (speaking of the answer of the United as such) and the decree of October 30, 1909, for such authority, if any exists.

We have quoted above the prayer for relief in the cross-bill (and bear in mind that there is no other), and the decree of October 30th, 1909, afetr dismissing the bill of the Munich Company, thus proceeded: "And the Court being further of opinion that the defendant is entitled to cross-relief as prayed in its answer, it is further adjudged, ordered and decreed that the case be and it is hereby referred to the auditor with direction to

(130) ascertain and report the amount, if any, *due* by the plaintiff to the defendant, under the said participation contract," etc. It did not say "due or to become due," and when passed the contract was still in force. The opinion of this Court in 113 Md., which concluded by saying: "As under our practice the answer of the defendant asking for such relief (cross-relief) may be treated as in the nature of a cross-bill, and as in a case of this character it is desirable to dispose of the whole matter in controversy, we deem the decree proper * * * and will affirm it," was not intended to, and did not, enlarge the decree it was affirming. "The whole matter in controversy" certainly did not include the business of 1910, as that year was only about one-third expired when the opinion of this Court was delivered, and therefore that statement can not aid the appellants' contention.

Nor was the opinion of the Court, delivered by Judge Urner, and reported in 121 Md., intended to extend the accounting beyond what the decree of October 30th, 1909, authorized, excepting in so far as the parties had by the agreement of 1910 agreed that it should be. Stress is laid on the statement that "The present accounting must accordingly include the annual ascertainments or profit and loss required to be made during the currency of the contract, and also the settlement for which it provides after the expiration of the notice of withdrawal." If the latter sentence be taken alone it might furnish some ground for contending that this Court intended the settle-(131) ment to include the two years after 1910, but when it is read in connection with what the Court was at the time considering, as it must be, it is not only perfectly clear, but says precisely what was intended to be said, which is not what appellants claim.

In the first place, it must be observed that Judge Urner said: "*The present accounting* must accordingly include," etc., clearly meaning the accounting then under consideration and to be determined by that decision, and not that the case was to be kept open for future settlements. The Court only had before it for review the accounting for the five annual periods, ending January 1, 1911. The audit before the Court did not include an accounting for a period after that time, and the Court did not pass on a settlement for any such period. There were three questions disposed of by the auditor's report,

which were brought before this Court by exceptions filed to the audit and ruled on by the lower Court. They were: (1) as to certain excise business; (2) as to whether the premium reserves for unexpired risks and the reserves for claims were to be included as disbursements, and whether interest was chargeable on the yearly balances, (3) whether the Munich Company was entitled to an allowance for good-will. After passing on the excise business, Judge Urner took up the premium reserves and the reserves for claims. He said: "The question as to the extent to which the premium and claim reserves should be considered in the accounting requires a reference to the relations of the contracting companies to each other at the time of the preparation of the audit." (182) He then said that by Article VIII of the participation agreement both classes of reserves were to be included in the annual accounts, but by Article XIII it was provided that if notice of termination is given the account to be stated after the expiration of that notice should not be charged with any premium reserve. Owing to the litigation between the parties no settlement of any kind had been made. The auditor's account was prepared in December, 1912, nearly two years after the withdrawal of the Munich, and after stating those facts the statement above quoted as to "The present accounting," etc., follows in the opinion. The premium reserves for unexpired risks represented "a proportion of the annual premiums set apart as unearned until the expiration of the year for which they are paid in advance. At the end of the term for which the premiums are received the reserve is released and becomes available as current income." By Article VIII both the premium reserve for unexpired risks and reserve for claims were to be included in the "Disbursements" in the annual accounts, but as by Article XIII the account to be made up not later than two years after the expiration of a notice of termination "shall not be charged with any premium reserve," and as the account was not stated until nearly two years after the contract was terminated, it followed that for the last year of the contract (1910) by virtue of Article XIII the premium reserve was not properly chargeable. The Court therefore determined that in the accounts for 1906, 1907, 1908 and 1909 both classes of reserves were (183) to be included, but for 1910 the premium reserve

was not to be included, because that reserve was by the time the audit was stated, "released," and had become "available as current income." Then by Article XIII it was provided that in case of notice of termination the Munich was to receive as reimbursement for good-will five per cent. of its share of the net premiums. It therefore followed that when the audit was stated in December, 1912, the premium reserve for 1910 was released and the net premiums on which the five per cent. for good-will was to be allowed were known. Consequently, when the account for the last year (1910) was stated, it was proper to have the settlement for which the contract provided, and that was done. In other words, as the parties had by their agreement of November 19, 1910, agreed that the settlement should be made for the five-year period according to the contract, and as the contract excluded the premium reserve from the last year and provided for the five per cent. for good-will being allowed the Munich, a proper accounting for that year necessarily included the settlement provided for after the expiration of the notice.

This Court declined to adopt the decree of the lower Court, which held that of $154,338.28 found to be payable by the Munich Company only $11,631.88 was a final indebtedness, and $142,706.40 was due to the United Company subject to a further accounting, which latter sum the decree provided should be paid to trustees to be held and administered under the jurisdiction of the Court. (184) This Court said: "According to the plain terms of the agreement, the Munich Company's shares of the losses shown by the annual accounts were *debts* which it owed absolutely and which it was obligated to pay immediately. The explicit provisions on this subject would appear to preclude the theory that there should be any further accounting as to the indebtedness thus determined. It is only with reference to amounts reserved for outstanding claims in the final account that the agreement provides for a further adjustment after the precise amounts required for the claims have been ascertained by actual settlement." This Court found that after excluding the premium reserve the account for the fifth year would show a loss of $30,247.28, and said: "One-third of this amount will be payable by the Munich Company to the Receivers of the United Company as an

ascertained liability, the parties remaining accountable with respect to outstanding claims as provided by the agreement."

The appellants also contend that the last clause of the last quotation indicates that it was the intention of this Court that there should be a further accounting, but manifestly it did not mean an accounting in Court. It says "accountable with respect to outstanding claims *as provided by the agreement.*" Art. XIII says: "If claims are still outstanding, the proper reserve shall be charged, and after the final settlement of *each of such claims*, the 'Munich' will be paid any difference in its favor, and pay any difference in favor of the 'United,' "and the (185) agreement of November 19, 1910, provided that "both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract." The latter agrement, which was the one which authorized the Court to set on the whole of the five-year period, especially said that such claims not yet settled were reserved for *future adjustment between the parties*, etc.—not in another audit in that case. As we have seen, the liability for unexpired risks, or what are elsewhere spoken of as premium reserves for unexpired risks, had been settled when the audit was stated (as the periods which the premiums covered had expired), and hence that was no longer open, but that for outstanding claims was not only still open but might continue for some years. It was at least possible that some of those claims would be unsettled for a long time, and there could have been no reason for the Court retaining jurisdiction of the case indefinitely for such claims, especially as there may never be any controversy between the parties to this case as to any of them. There was no more reason for continuing the accounting in Court in reference to the reserve for claims than for subsequent losses on insurance taken out during the five-year period, for which the Munich is liable for its share. Such liability on a guardian's bond, for example, might continue for some years after the settlement, and surely this case is not to be kept open for an accounting in reference to those. On the contrary, Judge Urner said: "*The accounting in* (186) *this case* does not effect the ultimate liability of the Munich Company with respect to obligations issued

by the United Company and covered by the participation agreement, as to which defaults are not now, but may be hereafter, disclosed. * * * The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement."

It is, therefore, perfectly clear that there is nothing in that opinion indicating that it was the intention of this Court that there should be any further accounting *in this case* after the audit was stated as directed by the opinion. As no such question was before us, even if we had been under the impression that there would be such an accounting as is now sought, and we had so assumed in the opinion, we would not be at liberty to so decree unless justified by the record.

There being nothing in the decree of the Court of October 30, 1909, or in any subsequent decree of that Court or of this, or in the agreement of the parties, authorizing the accounting now asked for, there can be no doubt about the conclusion the authorities must lead us to. The general rule is that nothing which has occurred since the filing of a bill can be added to it by amendment, but must be brought in by supplemental bill. *Miller's Eq. Proc.* 236. New events occurring after the filing of a bill should be brought forward by supplemental bill, as such facts can not be introduced by (187) amendment to the bill, *Ibid.* 246, and in a proper case a supplemental bill may be filed even after decree. *Ibid.* 248. Inasmuch, then, as notice of the withdrawal was given and the contract thereby terminated after the cross-bill was filed, and even after the decree for accounting, it would seem to be clear that if it could have been done at all such accounting as is now sought should have been asked for by supplemental bill. There was no attempt to amend the bill, and we do not mean by what we have said simply to distinguish between a supplemental and an amended bill, but in the absence of supplemental proceedings or agreement we have no authority to require this accounting in the original case.

There can be no doubt that under the rules of equity pleading the accounting was limited to that prayed for in the cross-bill, unless by agreement or in some way properly extended beyond that. We do not understand that to be denied by the appellants, but they rely on the

fact that it was not decided by this Court until May 6th, 1910, that the Munich Company was bound on the contract and was liable to an accounting, and that the agreement of November, 1910, was properly regarded as rendering unnecessary any supplemental pleading. But the difficulty about that is, as we have already seen, that the agreement of 1910 expressly limited the accounting to the five annual periods, which has been done. By no proper construction can that agreement be held to include the accounting now sought for. Nor can the (188) appellants be aided by the well-known principle, which is thus concisely stated in 16 *Cyc.* 106: "A Court of Equity which has obtained jurisdiction of a controversy on any ground, or for any purpose, will retain such jurisdiction for the purpose of administering complete relief and doing entire justice with respect to the subject-matter." On the next page of that volume it is said: "By virtue of the rule, the Court, when its jurisdiction has been invoked for any equitable purpose, will proceed to determine any other equities existing between the parties, connected with the main subject of the suit, and grant all relief requisite to an entire adjustment of such subject, *provided it be authorized by the pleadings.*" (Italics ours.) Again, on page 116 it is said: "The doctrine of retaining jurisdiction to settle the entire controversy is confined, however, to the determination of rights dependent upon or at most germane to the subject-matter and main purpose of the bill. Jurisdiction will not be retained to adjust independent controversies between the parties, or controversies beyond the scope of that raised by the bill." Some of our own decisions might be cited, but we do not deem it necessary, as the above quotations from *Cyc.* properly state the rule and its qualifications.

The petition filed by the appellants is itself suggestive of another reason why the Court below should not have passed the order prayed for. It was filed June 5th, 1914, over three years after the determination of the contract and about a year after our decision in 121 Md., and it (189) says, "the auditor of this Court is now engaged in the making up of an account in which the ultimate liability of the United Surety Company on claims covered by the participation agreement with the Munich Re-Insurance Company shall be finally established. That it

is right and proper that the papers in this case shall now be referred back to the auditor to state a final account between the plaintiff and defendant therein under the terms of said partition agreement" There is no suggestion of any difference between the two parties on any of the items to be settled. The only items left open after the decision in 121 Md. are the reserve for claims and the ultimate liability of the Munich Company with respect to obligations issued by the United Company, which were covered by the participation agreement, "as to which defaults are not now, but may be hereafter disclosed," to use the language of that opinion. As to the first, the participation agreement states what we have quoted above. The allowance of reserve for claims was directed by this Court, and was charged in the audit which was ratified December 26, 1913. There would seem to be but little, if any, room for controversy about such claims, and the Court cannot assume that items still to be settled will be disputed, regardless of any bona fide defense. Then as to the other class left open, Article XII expressly provides that the Munich Company shall remain "liable for its share of the claim arising out of such insurances, and out of insurance in force at the time of the notice being given until the expiration of the liability thereof." It is certainly not desirable (190) to have the receivers engage in useless litigation, or to have unnecessary costs imposed on those who are ultimately to have the benefit of the fund. So if the Court had the power to direct a further accounting, the wisdom of doing so would be questionable, under existing conditions. If it becomes necessary other proceedings can be instituted for the purpose. It may be that there will be difficulty in serving the Munich Company, but we can not assume that a foreign corporation of this kind, which has been doing business in this country, or at least some of its assets, can not be reached here, but even if that be so, we must be governed by the established rules of equity practice as we understand them. It follows from what we have said that the order of February 8th, 1915, dismissing the petition will be affirmed.

Order affirmed, the costs to be paid out of the fund in the hands of the receivers.

OPINION OF COURT OF APPEALS OF MARYLAND.

IN THE COURT OF APPEALS OF MARYLAND.

(191) Decided January 14, 1913.

Reported 119 Md. p. 348.

Murray Vandiver, State Treasurer of the State of Maryland and the United States of America,

vs.

Edwin W. Poe, Stuart S. Janney and Ernest J. Clark, Receivers.

Appeal from the Circuit Court of Baltimore City (Heuisler, J.)

The facts are stated in the opinion of the Court.

The cause was argued before Boyd, C. J. Pearce, Burke, Thomas, Pattison and Stockbridge, JJ.

Edward Duffy and John Philip Hill (with whom was Edgar Allan Poe on the brief), for the appellant.

Stuart S. Janney and George R. Gaither, for the appellees.

Washington Bowie, Jr., filed a brief on behalf on various policyholders.

Stockbridge, J., delivered the opinion of the Court.

On the 13th January, 1911, the United Surety Company was placed in hands of receivers. The bill filed in the case was by some of the stockholders and directors of the company, and among other things alleged that through mismanagement and wastefulness in the conduct of its affairs, the surplus of $250,000 had been altogether wiped out, and its capital stock had been impaired,

(192) but nevertheless the said company was solvent, but had been prohibited by an order of the State Insurance Commissioner from writing any further bonds of any nature or description until the impairment of its capital stock had been made good. The prayer of the bill was, first, that receivers might be appointed; second, for an injunction requiring the officers, agents and employees of the company to deliver to receivers the books, papers and accounts, and all the property of the company, and to refrain from interfering in any manner with the possession of the property by the receivers; and, third, that a day should be fixed before which all claims of every description should be filed in Court, or be forever barred from participation in the assets of the corporation. The allegations of the bill were admitted by the company by its answer.

In May, 1906, the company had deposited with the Treasurer of Maryland, $100,000, of the registered stock of the City of Baltimore, par value, in order to comply with the provisions of the Act of 1896, Chapter 160. (Code 1912, Art. 23, sec. 110.) At the same time it had deposited with the Treasurer of the State of Maryland an additional $100,000.00 par value, of the registered stock of the City of Baltimore, in order to meet the legal requirements imposed by the laws of some of the other states in which the company wished to do business. On the 27th July, 1911, the receivers filed a petition, the object of which was to require the State Treasurer to deliver over to (193) them the $200,000 par value, of Baltimore City stock, and by its order of July 28th, 1911, the Circuit Court of Baltimore City ordered such transfer from the State Treasurer to the receivers. Thereafter, and before the decree had become enrolled, the State Treasurer filed a petition to re-open the order of July 28th, in order that he and his bond might be heard thereon, and present objections thereto. These objections came on to be heard later, and after such hearing, on March 16th, 1912, the Court re-affirmed its order of July 28th, 1911, and directed the securities in the hands of the State Treasurer to be by him delivered over to the receivers of the company, and it is from these two orders or decrees that the present appeal has been taken.

The question presented is a narrow one, and one for which no precise precedent has been cited or found. While

there are a number of cases in which receivers of insolvent corporations, or corporations which have been dissolved, or the charters of which have been declared forfeited, have sought to recover from an official depository securities placed in his hands for the security of those doing business with the company, in order that the proceeds of such securities might be distributed among claimants according to their respective legal rights, no case has been found of a like application to gain possession of the securities of a solvent company. The solvency of the company in question is not merely alleged in the bill, but has been re-iterated time and again by (194) these receivers in various papers filed by them, and was distinctly testified to on the stand by one of the receivers, and it is alleged to have been the reason for the dismissal of an action instituted by certain of the stockholders of the company for the dissolution of the company. One of the receivers testified in these words: "We are endeavoring to work out a practical liquidation that will result in a benefit to those who own the property, that is, those who own its bonds, policies and stock."

In the case of the *American Casualty Co. case,* 82 Md. 535, $200,000 had been deposited in a similar manner with the State Treasurer, and an application was made by receivers of that company to turn over to them such securities, but in that case no question appears to have been raised as to the power or propriety of Mr. Jones, then State Treasurer, surrendering the property. At the time when the deposit was made in the *American Casualty case,* the statute, Act. 1892, Chapter 109, then in force, did not require a deposit with the State Treasurer of any securities by a company doing a surety business. In the able opinion filed in that case the late Chief Judge McSherry held, that the circumstances under which the deposit was made were such as to create a valid trust and to be administered as a trust, and further that if the State Treasurer "did not care to take upon himself the responsibility of distributing the fund among the parties entitled to it, he had the undoubted right either to invoke the aid of a Court in its distribution, or upon petition of the receivers to surrender it to the Court whose offi- (195) cers the receivers were," and that the fund then in Court "must be treated as impressed with a trust and

must be applied solely to the claims of policy holders," subject to prior or paramount liens. By the Act of 1896, Chapter 160, companies doing a surety business were brought within the control of the law, and the securities of such companies so deposited with the State Treasurer, were required to be "registered in the name of said treasurer, officially, as held in trust under and pursuant to this section, and the same shall be held by said treasurer, in trust for all the holders of policies or guarantees of said corporation. * * * And all of the said stocks so held in trust by the said treasurer * * * shall be held by said treasurer subject to sale and transfer and to the application of the proceeds of such sale by the said treasurer only on the order of any Court of competent jurisdiction." This presents the case of a fund distinctly required by a Legislative Act of Assembly as a condition of doing business, designated as a trust fund for a specific purpose with a trustee created by the Act, and the mode of the execution of his trust in some measure pointed out. The question is thus not identical with the situation which was presented in the *Casualty case*. There the insolvency of the company was established—here solvency is said to exist; there no statute had been provided covering the case—here we have an explicit one. In 1 *Beach on the Law of Insurance*, sec. 82, it is said: "The effect of statutes of the States providing for (196) the deposit of insurance companies of securities with some State official for the protection of its policy holders, and the act of the company in complying with such statute is to create a trust fund in the hands of such official, he thereby becoming trustee for the class of beneficiaries represented by the insured in those States. Such trust have been held as perfect as those created by deed or will and as much entitled to protection from the Courts. In a case where a life insurance company had deposited with a State Treasurer an amount in securities under a statute passed to enable it to thus comply with the requirements of statutes of other States, that it might do business in those States, had become insolvent, and its affairs and assets had been placed in the hands of receivers, it was held that the receivers could not by action recover this amount from the State Treasurer. It was a trust fund in his hands for the benefit of the various policy holders. The State had made him a trustee,

placed no limitation upon his rights and powers as such, and presumably intended to have him subject to the general law of trusts. When the trust terminates it is his duty to distribute the fund among the beneficiaries." The rule is thus expressed in *IV Joyce on Insurance*, sec. 3593: "In many States insurance companies are required to deposit a fund with the State Treasurer or other State officer for the security of the policy holders in such States. In case of a deposit being made in pursuance of such a requirement the receiver of the company can not obtain possession of the fund for the benefit of general (197) creditors, but is must be divided among the persons for whose protection it was deposited, and no other can acquire the benefits thereof."

The leading case on this subject is *Cook et al., Receivers*, v. *Warner, Treasurer*, 56 Conn. 234. In that case the Insurance Commissioner of Connecticut had taken proceedings against the Continental Life Insurance Company upon the ground that its assets were less than its liabilities, and asked the appointment of a receiver, and that the charter be annulled; and a decree was passed by which the charter was annulled (corporation dissolved) and receivers were appointed, and the receivers then demanded of the State Treasurer the securities which had been deposited with him, under a statute substantially like that in this State. The application of the receivers was refused, the Court holding that the trustee could not thus have the trust funds taken from him for use or even distribution by others, in the absence of an allegation that he was wrong either in possession or administration, that the statute could no more compel a trustee to surrender property lawfully subjected to a trust than it could compel a mortgagee or pledgee to release the mortgage or pledge without payment; that if turned over to the receivers it might be diverted from the specific trust purposes to which it was dedicated. The New York Court of Appeals in the case of *Ruggles* v. *Chapman*, 59 N. Y. 163, adopted the same rule, and an Act was then passed by the New York Legislature in which it was (198) thought that the rule had been modified, and in that way in the case of the *People* v. *Chapman*, 64 N. Y. 557, the question a second time reached that Court, and its former ruling was affirmed. These cases were followed in the later case *in re Guardian Insurance Co.*, 13

Hun. 115, although the judge deciding that case would evidently have been very glad if he could thus have diverted the fund from the hands of the trustee into those of the receivers. In the case of *in re Home Provident Safety Fund Association*, 129 N. Y. 288, there was a voluntary dissolution of the company; and it was held, that while the Court had power to make a distribution of its funds amongst those entitled, it had no power to take from a trustee funds placed in the hands of that trustee for a specific purpose and distribute them through its receiver instead of through the trustee; that the trustee was entitled to hold the fund notwithstanding the dissolution; but the courts might require the trustee to make the distribution of the funds in accordance with the terms of the trust on which it was held. The case of the *People* v. *The Am. Steam Boiler Works and Ward, Receiver*, 147 N. Y. 25, was one which turned mainly upon the right of the receiver to demand of the trustees the interest which had been received on the deposit, and that right was affirmed: but it was further held that under the then existing statute of New York, which had been passed in part to obviate the effect of the decision in *Ruggles* v. *Chapman, supra*, that a receiver was not entitled to have the fund turned over to him until the right of the policyholders had been settled. The appellee re-
(199) lies strongly for the purpose of sustaining the right of the receivers to the securities now in the hands of the State Treasurer, upon the case of *Hayne* v. *Met. Trust Co.*, 67 Minn. 245; in that case certain securities had been deposited with the State Insurance Commissioner, for the benefit of policyholders, and subsequently an exchange was effected by the company by which securities of a less value were substituted for the securities originally deposited, and the receiver proceeded against the trust company which then held the original securities to recover them for the benefit of the policyholders. This presented a far different case from the one before us; there had been a diversion of the trust fund, and it was a proceeding, not against the official who should have been the custodian of the security, but against a corporation which had gained possession of those securities, to recover them back, or in other words to restore a fund which had been permitted by the State official whose duty it was to guard it, to be diverted, and under

such a condition of facts there is no similarity to the present case. The appellee has also cited the case of *Relfe* v. *Spear*, 6 Mo. App. 129; that was the case of proceeding by the Superintendent of Insurance of the State of Missouri against the receivers of five different insurance companies, and the purpose of the application was to enable the Superintendent to distribute the proceeds of the securities In that case the phraseology of the Missouri Statute differed from that of New York; the companies had been dissolved, and under the word-
(200) ing of the statute it was held that the distribution should be made under the supervision of the Court through its receivers.

The case of the *Attorney General* v. *North Am. Life Ins. Co.*, 80 N. Y. 152, arose under an entirely different statute, one which provided for the sale and conversion into money by the Superintendent of Insurance of the securities deposited with him, and then contained this further provision: "The proceeds of such sale or sales shall be paid to the said receiver on his giving his receipt to said superintendent." This was an express direction of law, not for the turning over to the receiver of the securities held by the State Insurance Commissioner, but of the proceeds of sale, and under such a mandate the Court had no option when the Insurance Commissioner had made the sale required by the statute, but was bound to direct the turning over of the proceeds. This decision, therefore, can not be regarded as a precedent to the present case.

In *Falkenbach* v. *Patterson*, 43 Ohio St. 369, the Court goes only to the extent of saying that "the Superintendent of Insurance should act and perform his trust, and when the trust is fully performed, the remainder of the deposit, if any, should then and not until then be paid over to the assignee."

An Ohio Statute read, "The securities deposited with the Insurance Department pursuant to this section, shall be held by the Superintendent in trust for the benefit
(201) of, and as security for, the policy holders of such corporation, their legal representatives and beneficiaries," and in the *State* v. *Matthews*, 64 Ohio St. 419, where a recovery of the securities was sought by the assignee of an insolvent corporation, it was held, that the assignee could not recover them without first showing

that the company was no longer liable to the policyholders and that it was the duty of the Superintendent of Insurance to make the distribution among such policyholders. In all of these various cases the corporations, the recovery of the securities of which were asked, were insolvent, and as set forth as above, there is hardly a break in the line of decisions to the effect that receivers and assignees are not entitled to demand or obtain the possession of such securities, and if this be true with regard to insolvent corporations, with far greater reason must it be true in the case of a solvent corporation.

Much stress was laid in argument upon the complication and increased expense which would ensue from a distribution of the fund arising from the proceeds of sale of the securities in the hands of the State Treasurer, if that were required to be done in a separate and independent proceeding. Upon the case as presented in the record there is no case of distribution before this Court or even evidence that this fund, or any of it, will be required by the receivers for the liquidation of valid claims. From their report they apparently hold assets of the corporation to an amount somewhere between four and five hun-
(202) dred thousand dollars not impressed with any trust, and if the company is, as they aver and testify, solvent, it may well be that no part of the $200,000 will be required for the payment of any claims of policy holders. Apparently some such belief was in the mind of the Court below, as it passed no decree dissolving the corporation, but in fact dismissed a bill having that ultimate object in view.

The State Treasurer is now a party to the present proceeding; by his answer the disposition of the securities of the proceeds arising from them is under the control of the Equity Court in which these receivers were appointed, and while we do not decide that under a different condition of facts it might not be right and appropriate to direct the turning over of the proceeds of the sale of the securities to the receivers to distribute, or that the State Treasurer might not make a distribution of them in the same proceeding, we can find no sufficient warrant in the statute, or in the condition of the company as it now exists, to justify the turning over at this time to the receivers of a solvent corporation, securities which have been placed in the hands of a trustee for a

specific trust purpose, and with beneficiaries scattered in a large number of States.

The decree of July 28th, 1911, and March 16th, 1912, must therefore be reversed.

Decrees of July 28th, 1911, and March 16th, 1912, reversed, and cause remanded; the appellees to pay the costs of this appeal.

OPINION OF COURT OF APPEALS OF MARYLAND.

IN THE COURT OF APPEALS OF MARYLAND.

Munich Reinsurance Company

vs.

United Surety Company

the

Receivers of the United Surety Company

vs.

Munich Reinsurance Company.

(203) Decided June 26, 1913.

Reported 121 Md. p. 479.

The facts are stated in the opinion of the Court.

Cross-appeals from the Circuit Court of Baltimore City (Bond, J.).

The two appeals were argued together before Boyd, C. J., Burke, Pattison, Urner, Stockbridge and Constable, JJ.

Edgar H. Gans and R. E. Lee Marshall (with whom was Arthur Geo. Brown on the brief), for the Munich Re-Insurance Company.

Joseph C. France and Stuart S. Janney (with whom were Albert C. Ritchie and Robertson Griswold on the brief), for the receivers of the United Surety Company.

(204) Urner, J., delivered the opinion of the Court.

An agreement executed in the early part of 1906 between the Munich Re-Insurance Company and the United Surety Company, contained the following clauses upon whose construction the questions raised by this appeal depend:

"Article I. The 'United' agrees to cede to the 'Munich,' and the 'Munich' agrees to accept, a one-third (1/3) share of the amount insured or renewed under every bond, policy or guarantee which shall be issued by the 'United' in the territory of the United States, for indemnification against loss under the three classes of insurance known as Surety, Fidelity and Burglary Insurance."

"Should the 'United' decide at any time during the currency of this agreement to carry on any casualty or other business, it is agreed that the 'United' will offer to the 'Munich' a participation in such business under the terms of this agreement, and the 'Munich' has the right to accept or refuse the participation in such business."

"Should the 'Munich' elect not to participate in such business, the income and proper charges connected with that business shall not be an item of the account with the 'Munich'."

Article V. The 'United' shall charge the 'Munich', and the 'Munich' shall be liable for the original commissions and brokerage paid by the 'United', * * * and the 'Munich' further agrees that it shall be charged with one-third (1/3) of all management and office expenses connected with the business included under this contract," such expenses to "embrace a *pro rata* charge of a rental of ten thousand dollars ($10,000.00) per annum for the office of the 'United.'"

Article VIII. The 'United' will render to the 'Munich' within two months after the close of each year a detailed account, and such accounts shall include all income and disbursements in accordance with the books of the 'United', and shall be specific on the following items:

"Income:—1. Gross premiums. 2. Reserve for unadjusted claims at the end of the previous year. 3. Reserve for unexpired risks at the end of the previous year. 4. Interest received, excluding 4½% interest on the capital stock.

"Disbursements:—1. Return premiums and rebates. (205) 2. Re-insurance premium. 3. Claims paid, less salvage and re-insurance in other companies. 4. Commissions and brokerage allowed. 5. Salaries, fees and all other charges of officers, clerks, agents and other employees. 6. Taxes, license and insurance department fees. 7. Rental of offices and all other disbursements, itemized as follows: (a) Advertising. (b) Printing and stationery. (c) Legal expenses. (d) Miscellaneous expenses. 8. Premium reserve for unexpired risks. 9. Reserve for claims. The above shall only include expenses incident to the Surety, Fidelity and Burglary Insurance business."

Article IX. If the account provided for in the preceding article shows a profit, the 'Munich' shall receive one-third (1/3) thereof as its share under the terms of this agreement. If the said account shall show a loss the 'Munich will pay one-third (1/3) of said loss to the 'United.'"

"The account shall be examined within one month after its receipt, and any balance due by either party shall be paid immediately upon receipt of confirmation by New York draft, or its equivalent."

Article XII. This agreement shall take effect as of the second (2nd) day of January, 1906, and shall continue for a period of five (5) years from said date, and shall be tacitly renewed for further periods of five (5) years thereafter, unless written notice of a desire to terminate same be given by registered letter from either

party one year previous to the expiration of any term of five (5) years * * * The 'Munich' continuing to participate in all insurance coming within the terms of this agreement granted or renewed by the 'United', during the currency of any notice of cancelment, and remaining liable for its share of the claims arising out of such insurance and out of insurance in force at the time of the notice being given until expiration of the liability thereon."

Article XIII. It is especially agreed that in case notice of termination is given by either party under this agreement, the 'Munich' shall receive as reimbursement for good-will five per cent. (5%) of its share of the net premiums, *i. e.*, premiums less cancelments, of the last five years previous to the expiration of the notice of termination of this agreement."

In case of notice of termination by either party, the accounts shall be made up not later than two years after the expiration of the notice. Such account shall not be charged with any premium reserve. If claims are still (206) outstanding, the proper reserve shall be charged, and after the final settlement of each of such claims, the 'Munich' will be paid any difference in its favor and pay any difference in favor of the "United'."

The contract from which these clauses are quoted was sustained in 113 Md. 200 as against the effort of the Munich Company to have it annulled upon the theory that its execution by that company had been induced by fraudulent misrepresentations. It was found to be unnecessary to pass upon the question of fraud for the reason that the Munich Company was shown by the evidence to have waived the right of recission it was then asserting. The decree from which the former appeal was taken dismissed the bill of complaint filed by the Munich Company and provided for an accounting under the agreement as prayed by way of cross-relief in the United Company's answer. Upon the affirmance of this decree the cause was remanded for the further proceedings contemplated. In order to facilitate the accounting thus directed the parties entered into an agreement on November 19, 1910, by which they appointed the American Audit Company their agent "to examine the records,

books and accounts of the United Surety Company, and therefrom to state an account in annual periods beginning 2nd January, 1906, and ending on January 1st, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company" under the contract in question. The agreement authorized the appointment of one delegate for each of the companies to assist in the accounting. It was provided (207) that all amounts passed by the Audit Company, and to which no objection was raised by either of the delegates, should be deemed to be accepted, by both parties. It was agreed, however, that the audit should not extend to outstanding liabilities for unexpired risks or claims not yet settled, which were reserved for future adjustment under the terms of the contract. The Audit Company's report, which was to include a separate statement of the items in respect to which a difference of opinion might arise between the Munich and United Companies, was to be adopted as the basis of the accounting under the decree

The preliminary investigation for which the parties thus made provision was completed in December, 1911. In the report then submitted the Audit Company stated that as the agreement by which it was appointed provided for a statement of the results of the examination in yearly periods it had taken no notice of the question of good-will mentioned in Article XIII of the participation contract, and that no reference was made in the report to Premium Reserves and Reserves for Claims because the agreement under which the auditing was done expressly left these items open for further adjustment. The delegates, Mr. Stuart S. Janney for the United, and Mr. Gustave A. Zieman for the Munich, agreed as to all items covered by the Audit Company's accounting except those relating to a class of business conducted by the (208) United Company, known as "Excise Business," involving the execution by it as surety of bonds given to the State of New York by licensed liquor dealers as indemnity against the violation of any of the laws regulating the sale of intoxicating liquors. The question between the delegates in the first instance was whether this business was included in the classes of insurance specified in the agreement. After some discussion, however, they instructed the Audit Company to eliminate the items re-

lating to the excise business. These items embraced the receipts of income from that source and a comparatively small amount of expenses which could be identified as having been incurred in that particular connection. They did not include any part of the office and management expenses, commonly known as "overhead charges," attributable to the prosecution of the United Company's business as a whole. The Munich Company insisted that as the excise business proceeds were to be deducted from the income, with which the United Company was to be charged in the accounting, there should be excluded from the disbursements, for which it was to be credited, a proportion of the overhead charges in the ratio which the excise income bore to the entire volume of the company's premium receipts. This claim was resisted by the United Company on the ground that such a deduction from the disbursements would be in excess of the expenses for which the excise business was actually responsible. It was the understanding of Mr. Zieman that the ex-
(209) clusion of the excise proceeds was made distinctly subject to an allowance for overhead charges, while on the other hand Mr. Janney understood that the elimination of the ascertainable excise items was agreed upon unconditionally and that the question of overhead charges was left open for future determination. In view of the inability of the delegates to agree upon this point the Audit Company separated two sets of accounts, one including and the other excluding excise business. The report stated that it was impossible from the books of the United Company to separate the overhead charges as to the different classes of business conducted, and for that reason statements were made out showing the totals of such charges for each year with a memorandum added as to the net amount of the three classes of business, viz: 1. Fidelity, Surety and Burglary; 2. New York Excise; 3. Casualty.

After the Audit Company had thus reported the parties proceeded with the accounting before the auditor, to whom the decree had referred the case for that purpose. The questions then open and in controversy were: 1. The one already stated in reference to the excise business. 2. Whether premium reserves for unexpired risks and reserves for claims should be included or excluded as disbursements, and if included, whether interest was

chargeable upon the Munich Company's share of the apparent losses which the use of those items produced. 3. Whether an allowance should be made the Munich (210) Company for good-will under Article XIII of the contract. The auditor's report disposed of these questions as follows: 1. The excise business was excluded and a *pro rata* deduction was made for overhead charges. 2. The premium reserve for unexpired risks and the reserves for claims were included as disbursements, and interest was charged on the yearly balances. 3. No allowance was made to the Munich Company for good-will. Exceptions were filed by the Munich Company to the action of the auditor in reference to the 2nd and 3rd points indicated, and the United Company excepted as to the disposition of the question first noted. The Court below overruled all the exceptions and ratified the audit, and both parties have appealed.

The issue raised as to the deductions on account of the excise branch of the business under investigation can give us no difficulty. While the nature of the liabilities incurred by thee United Company in that connection would seem to place these undertakings in the category of surety business and therefore within the participation contract, yet, as clearly shown by the testimony taken before the auditor, the parties expressly agreed that the excise items of receipts and expenses should be excluded from the accounting, the only disagreement being in reference to the question whether the expense to be so deducted should include a proportionate part of the overhead charges. It is evident from the record that there is no available basis upon which the disbursements prop- (211) erly chargeable to the excise business can be estimated with any degree of accuracy. This subdivision of the Surety Company's activities undoubtedly had the benefit of the organization maintained for the promotion of its various corporate enterprises, but the books furnish no means of segregating the portion of the general management disbursements attributable to any particular department. The evidence tends to show that the excise business did not require the attention of the executive and office force to the same extent as the other lines of insurance in which the company was interested, and an apportionment of overhead charges according to the volume of the excluded business would appear to be

liberal. It is, however, according to the testimony in the record, the only method by which a proper allowance for these expenses can be approximated under existing conditions. In our judgment the Court below correctly disposed of this exception.

The question as to the extent to which the premium and claim reserves should be considered in the accounting requires a reference to the relations of the contracting companies to each other at the time of the preparation of the audit. So far as the annual accounts mentioned in Article VIII of the participation agreement are concerned it is distinctly provided that both classes of reserves shall be included. But there is an equally express provision in Article XIII that if notice of termination is given by either party, the account to be stated (212) after the expiration of the notice shall not be charged with any premium reserve. The privilege of withdrawal was secured to the parties by Article XII, as above quoted, and was exercised by the Munich Company in the manner prescribed, with the result that the contract ceased to be operative, except as to business already subject to its terms, when the original five year period expired on January 2nd, 1911. The auditor's account was prepared in December, 1912, nearly two years after the withdrawal of the Munich Company from the agreement. In consequence of the litigation between the parties no settlement ever occurred as to any part of the business to which the contract applied. The present accounting must accordingly include the annual ascertainments of profit and loss required to be made during the currency of the contract and also the settlement for which it provides after the expiration of the notice of withdrawal. The audit as filed is composed of five annual statements in each of which both premium and claim reserves are charged as disbursements. The statement for the final year of the contract will illustrate the method and theory of the accounting for all of the annual periods. It is as follows:

DISBURSEMENTS.

1.	Return premiums and rebates.....		$102,552.66
2.	Re-insurance Premiums.		20,537.74
3.	Claims paid, less salvage, and re-insurance in other companies.		213,809.28
4.	Commission and brokerage allowed....		86,726.52
5.	Salaries, fees and all other charges of officers, clerks, agents and other employees.		71,069.86
6.	Taxes, licenses and Insurance Depart-		
(213)	ment fees.		27,059.48
7.	Rental of offices	$13,160.36	
	and all other disbursements itemized as follows:		
	(a) Advertising expense..	7,442.74	
	(b) Printing and Stationery.	2,433.50	
	(c) Legal Expense.	9,599.64	
	(d) Miscellaneous Expense	42,207.18	
			74,789 41
8.	Premium reserve for unexpired risks..		185,698.88
9.	Reserve for claims.		242,420.34
	Total Disbursements.		$1,024,664.17
	Less Excise overhead charges.....		22,379.48
	Total Disbursements charged against the Munich Contract.		$1,002,284 69

INCOME.

1.	Gross premiums. . .....$	454,844.42
2.	Reserve for unadjusted claims at the end of the previous year.	66,063.23
3.	Reserve for unexpired risks at the end of the previous year.	254,951.96
4.	Interest received, excluding 4-1/2% interest on capital stock.	10,478.72
	By excess Disbursements over Income, contract.	215,946.36
		$1,002,284 69

The excess of the disbursements over the income is treated by the auditor as a loss, of which one-third is charged to the Munich Company with interest. In each of the preceding annual accounts, except the one for 1908, (214) a loss was similarly ascertained and charged. For the entire period the amounts found to be owing by the Munich Company, after crediting $3,117.12 as its share of the profits for 1908, aggregated $154,338.28 including interest to April 1, 1911.

It is explained by the testimony that the premium reserves for unexpired risks represent a portion of the annual premiums set apart as unearned until the expiration of the year for which they are paid in advance. At the end of the term for which the premiums are received the reserve is released and becomes available as current income. A new reserve is then created out of the premiums paid for the succeeding period. In the annual accounting for which the agreement provided the gross premiums were to be included in the income, and the proper deduction of the unearned portion was to be accomplished by charging premium reserves among the disbursements. The next accounting, however, would give the parties the benefit of the fund thus reserved by treating it as income under the description of "Reserve for Unexpired Risks at the end of the previous year." The same disposition was to be made with respect to the reserve for claims, which, as the designation suggests, was composed of amounts estimated for actual but unsettled losses. This reserve was intended to meet a real though unascertained liability to which both parties to the contract were subject in the proportions specified, while the premium reserve had no such purpose, but was provided merely as a suspension to that extent of the (215) right of the Surety Company to use the premiums as ordinary income until the expiration of the full period for which they were received.

In charging the reserves of both classes as disbursements in the annual accounts for the four years prior to the notice of withdrawal the audit is in conformity with the express provisions of Article VIII to that effect. But in the accounting for the business of the last year under the contract we think the terms of Article XIII are clearly applicable. The notice of withdrawal to which that article refers having been duly given, it is

directed that the account be made up not later than two years after the contract has been thus terminated and that no premium reserve be charged. If the previous accounting contemplated by the agreement had been effected by the parties, the only business left open for adjustment when the contract expired would have been that which pertained to the final year. It could not have been intended that as to this period there should be *two* accounts, one prepared under Article VIII including premium reserves as disbursements, and a later one under Article XIII from which such a charge should be excluded. The primary purpose of the annual statements was to show the profits or losses which the parties were to share. While the contract was in current operation there was no prejudice to either party in charging the premium reserves as disbursements for the reason that these items would be credited as income in the (216) account for the succeeding period. But when the agreement is no longer in effect and the accounting deals with the last year to which it can apply, the conditions are altogether different. The premium reserve could not in such a situation be used as a factor in determining the actual profit or loss upon which the settlement for that year depends because such a reserve as provided under this agreement, represents in fact neither a liability nor an expenditure. It was manifestly upon this theory that the contract excluded the premium reserve from the accounting to be stated after its expiration, and in order that credit might not be given for premiums which were not fully earned it provided for an extension of the time for the accounting until this item could properly be treated as income. In our judgment, the audit, which, as previously noted, was filed near the close of the two year period allowed for making up the account of the business for the last year, and at a time when the premiums received for that year were fully earned, should not have charged as disbursements the premiums reserve estimated as of January 1, 1911, and the exception which questioned the propriety of such a charge should have been sustained.

The decree overruling the exceptions and ratifying the audit recited that of the $154,338.28 found to be payable by the Munich Company $11,631.88 was a final indebtedness, and $142,706.40 was due to the United Company

(217) subject to a further accounting, and it was provided that the latter sum, with interest from April 1, 1911, be paid by the Munich Company to trustees named in the decree to be held and administered under the jurisdiction of the Court in accordance with the intent and meaning of the agreement between the two companies. It does not seem to us that this disposition of the case gives effect to the real purpose of the contract. The amount shown by the audit to be due by the Munich Company on account of the business of the fifth year was $71,982.13 The total of $154,338.28 was produced by adding to the result of the accounting for the last year of the contract period the amounts found to be due for the four preceding years. According to the plain terms of the agreement the Munich Company's shares of the losses shown by the annual accounts were *debts* which it owed absolutely and which it was obligated to pay immediately. The explicit provisions on this subject would appear to preclude the theory that there should be any further accounting as to the indebtedness thus determined. It is only with reference to amounts reserved for outstanding claims in the final account that the agreement provides for a further adjustment after the precise amounts required for the claims have been ascertained by actual settlement. The last in the series of the annual statements, as filed by the auditor, charges $185,698.88 as premium reserve, and $242,420.34 as reserve for claims The sum of these two items is $428,-
(218) 119.22, and one-third of this is $142,706.40, which is the exact amount directed by the decree of ratification to be paid to trustees with a view to subsequent accounting. The fund thus proposed to be created was largely in excess of the Munich Company's share of the losses for the last year, as shown by the account, and it was therefore ordered to be reserved out of the total indebtedness of that company ascertained for the whole period. As a result the Munich Company was placed in the position of owing only $11,631 88 as a "final indebtedness" to the United Company, although according to the annual accounts its liability for losses was definitely fixed at $30,393.35 for 1906, $22,158.99 for 1907, $19,774.14 for 1909, and $71,982.13 for 1910, as against which it was entitled to a credit of only $3,117.12 for profits found to have been earned in 1908. By the terms of the contract

the Munich Company's shares of losses or profits were payable promptly upon their annual ascertainment, and if they had been so paid, it is clear that there would have been no occasion to reopen the accounts thus settled, except as to the claim reserves for the final year under the special provision for that purpose.

The United Company is entitled unconditionally to the amounts found to be due it for the four years prior to the notice of withdrawal, as evidently intended by Articles VIII and IX of the contract, and the results thus determined are not dependent upon the accounting for the last year of the business, which is placed upon a (219) separate and distinct basis by the provisions of Article XIII. From the account for this final period the item of $185,698.88 as a premium reserve for unexpired risks should be eliminated. The trust created by the decree passed by the Court below would eventually accomplish this object, but we see no reason to require the Munich Company to pay out, even for a limited period, a proportionate part of the large sum just mentioned, when it is certain that the premiums for which the reserve was originally provided have long since become fully earned. The charge for claim reserves should be retained in the accounting, as contemplated by Article XIII. With the premium reserve excluded from the disbursements the account for the fifth year would show a loss of $30,247.48. One-third of this amount will be payable by the Munich Company to the receivers of the United Company as an ascertained liability, the parties remaining accountable with respect to outstanding claims as provided by the agreement.

The question raised by the exceptions as to the allowance of interest must be decided in the light of the provisions of Articles VIII and IX of the contract, to the effect that an account should be rendered by the United Company within two months after the close of each year showing the income and disbursements as specified, that the account should be examined by the Munich Company within one month after its receipt, that the Munich Com- (220) pany should receive one-third of the profits or pay one-third of the losses thus shown, and that the amount due by either party should be "paid immediately upon receipt of confirmation by New York draft, or its equivalent." Inasmuch as the time thus allowed for the submission and examination of the account might

extend over three months subsequent to the close of the respective annual periods, the audit correctly treated the indebtedness for each year as being due and payable on the first day of the following April. It was contended that no interest should be charged because the reverses which entered into the account as disbursements were not proper factors in the calculation of the *actual* profit or loss for any given year, and that but for the use of these items the apparent losses upon which the indebtedness of the Munich Company is based would not have been indicated. The difficulty in the way of our acceptance of this theory is the definite agreement of the parties that both classes of reserves should be charged as disbursements in the accounting for the period antecedent to the notice of termination, and that the profits or losses thus determined should be paid in the proportions and manner prescribed. This being the plain effect of the contract, and the direction being positive as to the *immediate* payment of the annual balances ascertained by this method of accounting, we think interest is properly allow-
(221) able on these amounts from the time they were respectively due.

The Munich Company claims the benefit of the provision in Article XIII that in case of a withdrawal notice being given, that company should receive as "reimbursement for good-will" five per cent. of its share of the net premiums for the five years previous to the termination of the contract. This credit was disallowed in the audit on the ground that the course pursued by the Munich Company in attempting to rescind the contract and prosecuting a suit for its annulment, which continued during almost the entire period of its operation, had the effect of retarding instead of promoting the development of the good-will of the business to which the agreement related. It is to be observed that the only duties imposed by the contract upon the Munich Company were to meet its proportionate liabilities on the classes of insurance designated and to pay a corresponding share of the losses. It is being held to the full measure of these obligations in the present accounting. The record is by no means conclusive in showing that the exercise by the Munich Company of its legal right to question the validity of the contract so materially preju-

diced the United Company's interests as to justify the Court in obliterating one of the provisions upon which the two companies definitely agreed. It was in 1906 that the effort to rescind the agreement was begun, and yet the gross premiums of $123,177.90 received for that year from the designated classes of insurance increased to (222) $262,256.74 for 1907, $423,543.97 for 1908,, $626,-996.71 for 1909 and $454,844.42 for 1910. During these years, which covered the whole of the United Company's active career, the Munich Company was being charged with one-third of the management and office expenses incurred by the former company in the prosecution of its general enterprise. The five per cent. provided by Article XIII is characterized as a "reimbursement" to be received by the Munich Company, and it was therefore plainly intended as a repayment in part of the disbursements with which that company was charged and which were regarded as contributing to the establishment of the United Company's business and good-will during the early and relatively expensive period of its existence. This provision of the contract is emphasized by its declaration that the parties had "especially agreed" upon the five per cent. reimbursement to which it referred. The conditions presented by the record are not, in our view, of such a character as to justify an adjudication that this formal, positive and unqualified stipulation has become inoperative, while the remaining provisions of the contract are enforceable. It is our conclusion, therefore, that the Munich Company should be credited with five per cent. of its share (one-third) of the net premiums received from the specified classes of business during the period of agreement. This credit will amount, according to the exhibits accompanying (223) the audit to $25,094.47. The total amount correctly shown by the audit to be owing by the Munich Company as of April 1, 1910, including interest to that date, is $77,983.79. To this the audit added $4,372 36 as interest to April 1, 1911. The indebtedness we have found to be chargeable against the Munich Company in the account for the final year is one-third of $30,247.48, or $10.082 49. The aggregate of these debit items is $92,438 64. Upon this indebtedness the five per cent. allowance should be credited as of April 1, 1911, and interest should be calculated and charged on the remain-

der to the date of payment. The amount thus ascertained will be payable to the receivers of the United Surety Company, as we find no necessity to direct its administration by separate fiduciaries.

The accounting in this case does not affect the ultimate liability of the Munich Company with respect to obligations issued by the United Company and covered by the participation agreement, as to which defaults are not now but may be hereafter, disclosed. For the protection of potential claims of this nature, as between the United Company and the holders of its bonds and policies, provision has been made in the form of a premium reserve directed in the proceeding reviewed by this Court in *United States* v. *Poe et al., Receivers of the United Surety Company*, 120 Md. 89. The premium reserve there provided, and whose function is clearly and thoroughly discussed in the opinion by JUDGE STOCKBRIDGE, rests (224) upon a different basis from the bookkeeping charge bearing that designation which is stipulated in the contract with the Munich Company as one of the factors in the annual ascertainment of its share of the losses or profits. This item is excluded from the accounting as to the last year of the agreement because there is an express provision to that effect in recognition of the fact that such a reserve is not justly pertinent to the determination of the actual results of the business and of the amount properly payable by one contracting party to the other for the final period. The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement.

Decree affirmed in part and reversed in part and cause remanded, to the end that the audit may be re-stated in accordance with this opinion, the costs of the cross-appeals to be paid equally by the parties.

IN THE CIRCUIT COURT OF BALTIMORE CITY.

In the case of

Munich Re-Insurance Company

vs,

United Surety Company.

(225) Filed 17 July, 1913.

To the Honorable Henry Duffy, Judge, &c.

The Auditor reports to the court that he has examined the proceedings in the above entitled cause, and from them has stated the within account.

WHEREIN the Account from January 1st, 1910, to January 1st, 1911, is restated, in accordance with the opinion of the Court of Appeals of Maryland, April Term, 1913, Munich Re-Insurance Co. vs. United Surety Co. The opinion of the Court of Appeals shows that the total amount due by the Munich Company as of April 1st, 1910, including interest to that date, is $77983.79; to this is added $4372.36, as interest due April 1st, 1911; the Court of Appeals finds that the Munich Company owes $10082.49 for the year ending January 1st, 1911, making a total indebtedness of $92,438.64, as of April 1st, 1911. The Court of Appeals finds that the Munich is entitled to a credit of $25094.47 for "Good Will", making the net indebtedness as of April 1st, 1911, due by the Munich to the Receivers of the United Surety Co., $67344.17. Upon this amount, in accordance with the opinion of the Court of Appeals, interest is calculated to the 26th day of July, 1913, the probable date of ratification of this Account.

In accordance with the opinion of the Court of Appeals, this Account does not affect the amount properly payable by one contracting party to the other for the final period. "The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the Agreement."

A 'itor's time, six days,

Respectfully submitted,

(226)

EDW. GUEST GIBSON,
Auditor.

The Contract of the Munich Re-Insurance Company, In Account
Dr.

To the United Surety Co., for its disbursements, as shown by Exhibit "L", contra, supplemented by the testimony of Messrs. Parvis and Miles, for the year beginning January 1st, 1910, and ending January 1st, 1911, in accordance with Article XIII of the Participation Contract, contra, under the opinion and decree of the Court of Appeals of Maryland, in the case of Munich Re-Insurance Co. against the United Surety Co. April Term, 1913,

viz.

Disbursements.

1. Return Premiums and Rebates.		$102552.66
2. Re-Insurance Premiums.		20537.74
3. Claims paid, less Salvage, and Re-Insurance in other Companies.		213809.28
4. Commission and Brokerage allowed. . .		86726.52
5. Salaries, Fees, and all other Charges of Officers, Clerks, Agents, and other Employees		71069.86
6. Taxes, Licenses, and Insurance Department Fees.		27059.48
7. Rental of Offices.	$13106.35	
And all other Disbursements itemized as follows:		

(a) Advertising Expense	7442.74	
(b) Printing and Stationery	2433.50	
(c) Legal Expense	9599.64	
(d) Miscellaneous Expense	42207.18	
		74789.41
8. Premium Reserve for Unexpired Risks, eliminated in accordance with the opinion of the Court of Appeals	($185698.88)	
9. Reserve for Claims		242420.34
Total Disbursements		$838965.29
Less Excise Overhead Charges, for which the Munich claims credit on its Contract, as per the figures of the American Audit Co., for the year 1910, as shown in Exhibit Munich No 2, filed with the Auditor		22379.48
Total Disbursements charged against the Munich Contract		$816585.81
Forward		$816585.81

With United Surety Company, Cr.

By amount of Income of of the United Surety Co., in connection with the Participation Contract between the Munich Re-Insurance Co, and the United Surety Co., for the year commencing January 1st, 1910, and ending January 1st, 1911, in accordance with Article XIII of said Participation Contract, based upon Exhibit "L" filed with the Report of the American Audit Co., on the 13th December, 1911, supplemented by the testimony of Messrs. Parvis and Miles.

viz.:

Income.

1. Gross Premiums.	$454844.42
2. Reserve for Unadjusted Claims at the end of the Previous Year.	66063.23
3. Reserve for Unexpired Risks at the end of the Previous Year.	254951.96
4. Interest received excluding 4-½% Interest on Capital Stock.	10478.72

Note.

It is reported to the Auditor that $20677 97 was collected by way of Interest, and $4075.75 of Interest is charged against Munich in 1909,

and that 4-½% on Capital Stock amounts to $14275.00.		
By Excess Disbursements over Income, contra.		30247.48
Forward.		$816585.81
(228)		
To am't br't forward		$816585.81

Note No. 1.

The Difference between Income and Disbursements shows a loss, as per contra, $30247.48. Of this loss, under Article IX of the Participation Contract, the Munich Re-Insurance Co. will pay one-third to the United Surety Co., namely, $10082.49.

This amount due by Munich Re-Insurance Co. to the United Surety Co., as of April 1st, 1911, and as per this Account. $10082 49

Note No. 2.

Net amount due by Munich April 1, 1910,	$77983.79	
Int. on $53098.34, plus $19774.41, or $72,872.75, from April 1, 1910, to April 1, 1911, 1 year, @ 6%.	4372.36	
	$82356.15	

Amount due by Munich April 1, 1911	10082.49
	$92438.64
Less allowance for "Good Will", as per Exhibits filed with the Auditor's Account on 16th December, 1912.	25094.47
Total Claim as of April 1, 1911.	$67344.17
Interest thereon @ 6%, to say July 26th, 1913, 2 years, 3 mos., 26 days.	9383.26
Total due and payable as of 26th July, 1913, by the Munich to the Receivers of the United Surety Co., in accordance with the opinion of the Court of Appeals of Maryland rendered April Term, 1913, Munich Re-Insurance Co. vs. United Surety Co.	$76727.43

Note No. 3.

Interest due by Munich on $53098.34, Jan. 1, 1910, to Jan. 1, 1911, 1 yr., @ 6% ..	$3185.90	
Interest due by Munich on $19774.41, Apl. 1, 1910, to Jan. 1, 1911, 9 mos. @ 6% ..	889.85	
Total Interest charged Munich, 1910.		$4075.75

	$816585.81
(229) By am't br't forward	$816585.81
	$816585.81

COPY

No. Docket.

(230) CIRCUIT COURT

Munich Re-Insurance Co.

vs.

United Surety Co.

ANDITOR'S REPORT AND ACCOUNT

Order nisi. 191

Final Order. 191

Filed. 191

In the Circuit Court of Baltimore City.

Ordered by the Court, This 17th day of July, 1913, that the aforegoing Report and Account be ratified and confirmed as stated and reported by the Auditor unless cause to the contrary be shown within ten days of this date.

WM. M. CARSON, Clerk.

In the Circuit Court of Baltimore City.

Ordered by the Court, This 26th day of Sept. 1913, that the aforegoing report and Account of the Auditor be and the same is hereby finally ratified and confirmed, no cause to the contrary having been shown, and that the Trustee apply the proceeds accordingly with a due proportion of interest as the same has been or may be received.

CARROLL T. BOND.

RECEIPT OF RECEIVERS.

(231) (Filed 4th Octobber, 1913.)

Baltimore, October 2, 1913.

As receivers of the United Surety Company, heretofore appointed by the Circuit Court of Baltimore City in the case of Thomas H. Bowles vs. United Surety Company, and as such parties by intervention in the case of Munich Re-Insurance Company vs United Surety Company, we, the undersigned, acknowledge the due receipt from the Munich Re-Insurance Company of the amount of the claim of the United Surety Company against the Munich Re-Insurance Company as of April 1, 1911, $67,344.17, together with interest thereon to September 30, 1913, amounting to $10,101.62; making the total amount paid to the undersigned as aforesaid $77,445.79, under and in accordance with the Auditor's Report and Account which was filed in the last-mentioned case on July 17th, 1913, and was finally ratified and confirmed on September 26th, 1913, by the said Court in said case of Munich Re-Insurance Company vs. United Surety Company.

EDWIN W. POE,
STUART S. JANNEY,
J. KEMP BARTLETT,
ERNEST J. CLARK,
Receivers of United
Surety Company.

OPINION OF COURT.

(232) Filed 27th December, 1921.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Munich Re-Insurance Company, a corporation, and

Francis P. Garvan, Alien Property Custodian.

Rose, District Judge:

The plaintiffs are the receivers of the United Surety Company, a Maryland corporation. They and it will both be referred to as the United unless there is occasion to disinguish between them. The principal defendant is the Munich Re-Insurance Company, a corporation of Bavaria. The Alien Property Custodian, who holds its American property does not raise any defense peculiar to himself, and may in this discussion be ignored.

The United was chartered in 1906. Within a few months after its organization, it concluded with the Munich a participation agreement, upon which this suit is brought. As early as November 1, 1906, the latter sought to rescind on the ground that its assent had been procured by fraudulent misrepresentations. The United replied with a request for an accounting, for what was due to it under the contract. It was not until 1910 that the case reached the Court of Appeals of Maryland, (Munich Re-Insurance Company vs. United Surety Company, 113 Md. 200). It was then held that the Munich, having waived its right to rescind, must account. Before the decision was handed down, it had, as the agreement

(233) authorized, given a year's notice of its election to cancel the contract as of January 1, 1911.

The five years of the United's life were short and troubled. Its business grew, it is true, and at times appeared to be profitable, but the event showed that the unfavorable judgment of some of the shrewder of those who came into actual contact with it was abundantly justified It had trouble with the Insurance Commissioners of some of the States, and its licenses to do business in two or three important commonwealths were revoked. In the closing months of 1910, it unavailingly tried to get some one to take over its business. The sands of its life were fast running out, and it looked as if there would soon be a chance for someone to earn an undertaker's fee.

In the latter part of December, 1910, a bill to put it into the hands of a receiver on the ground of insolvency was filed in a State Court of Equity. At that time the company was not quite sure that it was dead, and the individuals interested in its management wished to have something to say as to who should bury it when the end came. Then on the 11th of January, 1911, the Insurance Commissioner of Maryland forebade it to do further business here. It was still unwilling to have its obsequies taken charge of by those whom the month before had seemed unduly solicitous to perform the last offices for it, so it went into another State court having equity jurisdiction. It there told the chancellor that it was solvent, but life was to it no longer worth living. It asked that its dissolution should be decreed and the claims against it liquidated. It was in this last named (234) proceeding that the present plaintiffs were appointed. In much of the subsequent litigation, the Court continued to assume that it was solvent, as it had alleged itself to be.

Prestion vs. Poe, 116 Md., 1; Vandiver vs. Poe, 119 Md., 348; U. S. vs. Poe, 120 Md., 89.

Nevertheless, there does not appear to be any question that at the present time it owes more than it is or ever will be able to pay, a result to which the litigation in which it has been engaged may perhaps have contributed. In addition to the cases already mentioned, its affairs have been before the Court of Appeals of Maryland in Poe vs. Philadelphia Casualty Co., 118 Md., 347;

Beilman vs. Poe, 120 Md. 444; Munich Re-Insurance Co. vs. United Surety Co., 121 Md. 479; Poe vs. Munich Re-Insurance Co., 126 Md., 520; Schlens vs. Poe, 128 Md., 352; Barber Asphalt Company vs. Poe, et al, decided June 29, 1921, Atlantic; Schlens vs. Poe, 131 Md., 182; and perhaps others which have escaped my notice.

Doubtless, however, its present plight was inherent in the nature of things. A complete stoppage of almost any enterprise entails serious losses, and this is peculiarly true of a company whose business is that of becoming a surety not only for the fidelity of employees, but upon court, official and contract bonds as well. It is difficult to fix any point of time subsequent to which claims against it may not arise out of obligations incurred many years before. All sorts of difficult questions come up, and undue expenses, if not dissipation of assets is an almost inevitable consequence.

There has already been an accounting between the (235) United and the Munich in the manner directed in some of the opinions already cited. That accounting, however, could not, in the view of the Court of Appeals, do more than ascertain what was payable by the Munich to the United on January 1, 1911. In the present proceeding, the plaintiffs are seeking to recover certain sums which they think became due after that date, and the right to recover which when due was expressly recognized, if not decided in some of the cases to which reference has already been made.

In substance, the bargain between the United and the Munich was that the latter should have a third share in certain classes of risks constituting the bulk of the business done by the former. It was to get one-third of the receipts and to accept a one-third share of the amount insured or renewed under every bond, policy or guarantee which should be issued by the United in this country, for indemnification against loss under surety, fidelity and burglary insurance. The contract expressly declared that in each and every case, the liability assumed by the Munich should be one-half of that retained by the United.

To make sure that in the end this result should be completely and exactly attained, a method of accounting was somewhat elaborately prescribed. There were to be annual accounts, and another was to the stated two years after the agreement had come to an end. In order that

balances might be promptly struck, certain items were to be estimated in ways specified. Two years later there was to be another accounting, in which there were still to be some, although fewer arbitrary assumptions. But the end was not yet, for it was recognized that there (236) would be claims outstanding even after the expiration of two years from the termination of the agreement, and the contract expressly declared that after the final settlement of each claim outstanding at the time of the last accounting, the Munich would be paid any difference in its favor, and would pay any difference in favor of the United.

It is not questioned that if by the phrase "final settlement" is meant the agreed or adjudged determination of the amount due on bonds written during the existence of the contract as distinguished from their payment, the difference is in favor of the United, and this proceeding is brought to ascertain and recover its amount.

One defense of the Munich goes to the root of the United's case. It is based upon the undoubted fact that the receivers shortly after their appointment, busied themselves in bringing about a cancellation of all outstanding risks, and for that purpose, returned or released premiums for unexpired terms, and so extinguished the possibility of liability subsequently arising. They succeeded in cancelling six-sevenths or more of the aggregate insurance outstanding at the time of their appointment. The Munich points out that it was to continue even after the termination of the notice of cancellation to participate in all insurance granted or renewed by the United during the currency of such notice, as well as to remain liable for its share of the claims arising out of such insurance and out of insurance in force at the time the notice was given. It says that if nothing had happened to the United, the latter, after January 1, 1911, would have received premiums in which it would have been entitled to share, and that by the United's failure (237) to continue business, and the cancellations of policies therefrom resulting, it is deprived of the consideration or a part of the consideration moving to it in return for its assumption of liability, and it relies upon the doctrine laid down in Central Trust Co. vs. Chicago Auditorium, 240 U. S., 581-91 as applicable and therefore controlling.

There, until bankruptcy came, the contract was still alive, and all the obligations of each party were still in full force. Under it the bankrupt had services to render. That was not the situation in the instant case. By the election of the Munich, the contract ended on January 1, 1911, except for the settlement by one or the other of the obligations already incurred. Thereafter the Munich had no interest in any new insurance which the United might write. It had no right to require that the United should continue in the business in which it had of its own free will declined to have lot or part. After the expiration of the notice of termination, the United was free to decide for itself whether it would go on, and the Munich had no right to complain that the decision was in the negative. When such a concern ceases to do new business, it must either in one form or another reinsure its outstanding risks or do what it can to terminate, so soon as may be, its liability upon them. To keep up its complete organization, for the mere purpose of handling insurance already written and such renewals as might be brought about, would be ruinous and no such contract as this between insurance companies can reasonably be interpretated as binding either of the parties to such waste of money. The United tried to reinsure, but so far from being able to do so, it could not find anybody willing to assume its liabilities in exchange for its assets. That is, in the judgment of the other companies who had (238) at its instance, examined its books with a view of taking over its business, it had already incurred obligations which would seemingly entail a loss upon its exceeding the amount of its capital. For a third of the larger part of these losses, the Munich would be liable. In that state of things, all that the Munich could justly require was that the United should, in good faith, exercise reasonable care to wind up its business to the best advantage, and that, so far as the record discloses, is precisely what the receivers did.

The Munich was to pay one-half of the net liability retained by the United. There was no limitation as to the amount for which it might become bound. When the contract was made, it was quite possible that the obligations which in five years the United might assume, would ultimately entail a liability exceeding its capital and surplus. In that event, it would have to close its doors

and liquidate its business, and if it did, according to the Munich's present contention, the latter would be discharged, that is to say, if the United's losses were very great, the Munich would be released from obligation to pay any of them. Such a claim is its own best answer. It is therefore unnecessary to decide whether, as the United asserts, the Munich has estopped itself from setting up a defense which has, on other grounds been held bad. The litigation between the two companies continued for years after the United went into receiver's hands, and after the latter had done all in their power to bring about a cancellation of the outstanding risks. Never, until the institution of these proceedings, did the Munich raise the point upon which it now seeks to rely. It allowed all the other courts to assume that it did not dispute its obligation to account at the proper time and in (239) the appropriate proceeding. If for the purposes of this case it be assumed that all this did not work a technical estoppel, it at least shows that the present defense had not then suggested itself to the ingenuity of any of the able, astute and experienced counsel who appeared for the Munich. It is difficult to resist the conclusion that it would not so long have escaped their attention had there been anything of substance in it.

The United is therefore entitled to an accounting. Even so, the Munich says that when such an accounting is had, it can be charged only with one-third of the sums actually paid out upon the bonds or policies upon which it had, in the language of the agreement, "assumed liability." It bases this contention upon that portion of article 13 of the agreement which having provided for an accounting not later than two years after the expiration of the contract, says: "If claims are still outstanding the proper reserve shall be charged, and after the final settlement of each of such claims, the Munich will be paid any difference in its favor and pay any difference in favor of the United." It argues that final "settlement" here means payment. So to hold would run counter to the whole scheme of the agreement between the companies. What the Munich assumed was one-third of the liability, and there is nothing anywhere to suggest that the parties intended that the lapse of time should in any wise change this obligation The words "final settlement" as used in this contract must be held to mean the

fixing by agreement or judicial determination of the amount due by the United on the bonds or policies for which the Munich assumed a one-third liability.

A decree in accordance with these conclusions may be submitted.

DECREE OF COURT REFERRING THE PAPERS IN THIS CASE TO EDWARD GUEST GIBSON, SPECIAL MASTER, TO STATE AN ACCOUNT.

(240) Filed 30th January, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Thomas W. Miller, Alien Property Custodian and Munich Reinsurance Company, a corporation.

This cause having duly come on to be heard on the pleadings and proofs adduced by the respective parties, and having been argued by their respective counsel, and the Court being of the opinion that the respondents remain liable to the complainants under the terms of the participation agreement put in evidence in this case, and that the liability of the respondents is proportionate to the liability of the United Surety Company, irrespective of the amount of the United Surety Company may pay or distribute to its creditors.

Now, therefore, it is this 30 day of January, 1922, by

the United States District Court for the District of Maryland, ORDERED, ADJUDGED and DECREED, that the papers in this case be and they are referred to Edward Guest Gibson, Special Master, to state an account of the business of the United Surety Company participated in by the Munich Reinsurance Company under the terms of the participation agreement in evidence in this cause from January 1, 1911, to the date of the decree, said account to show the amount of loss thereupon, if any and the proportion thereof for which the said respondents are liable under the terms of the said agreement.

In stating said account the Special Master shall credit:

1. Reserve for unadjusted claims as showed on the (241) account between the United Surety Company and the Munich Reinsurance Company confirmed by the Circuit Court of Baltimore City on September 26, 1913, in the case of the Munich Reinsurance Company versus United Surety Company in said Court pending.

2. Gross premiums charged since January 1st, 1911, on all business participated in by the Munich Reinsurance Company.

On said account the following items shall be charged:

(1) Return premiums and rebates allowed since January 1st, 1911, on business participated in by the Munich Reinsurance Company, to be included therein any premiums credited on this account or on the account stated between the United Surety Company and the Munich Reinsurance Company, and ratified by the Circuit Court of Baltimore City, on September 26th, 1913, but which have proved uncollectible.

(2) Premiums on reinsurance paid or allowed by the United Surety Company since January 1st, 1911, on business participated in by the Munich Reinsurance Company.

(3) Claims paid by the United Surety Company or

the receivers thereof, or finally allowed in the Auditor's accounts in the case of Bowles et al. vs. United Surety Company, pending in the Circuit Court of Baltimore City, in which the receivership of the United Surety Company is administered, which claims are based on bonds or policies participated in by the Munich Reinsurance Company, less salvage and reinsurance in other companies.

(4) Commissions and brokerage and taxes allowed or paid since January 1st, 1911, on premiums credited on the account or on the account stated between the United Surety Company and the Munich Reinsurance Company, and ratified by the Circuit Court of Baltimore City on (242) September 26, 1913.

(5) Legal fees and expenses incurred by the United Surety Company or the Receivers thereof since January 1st, 1911, in auditing, adjusting or contesting claims based on bonds or policies of the United Surety Company, included in business participated in by the Munich Reinsurance Company.

No reserve for outstanding claims not yet settled shall be charged in said account but jurisdiction is reserved and will be reserved in the decree hereafter to be passed to determine the liability of the parties hereto, with respect to any such claims upon the final settlement thereof by agreement or judicial determination.

Leave is granted to the parties to adduce evidence before the Special Master in support or in defense of any or all of the items in said account.

Having completed his account with all convenient speed, the Special Master shall report the same to this Court for confirmation and for the passage of such further decree as this Court may deem right in the premises.

JOHN C. ROSE,
District Judge.

REPORT OF SPECIAL MASTER.

(243) Filed 9th November, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Thomas W. Miller, Alien Property Custodian and Munich Reinsurance Company, a corporation.

To the Honorable, John C. Rose, Judge of said Court:

The Report of Edw. Guest Gibson, Special Master, by appointment of this Court under Decree dated 30th January, 1922, "to State an Account of the business of the United Surety Company participated in by the Munich Reinsurance Company under the terms of the Participation Agreement in evidence in this cause from 1st January 1911 to the date of the Decree, said Account to show the amount of loss thereupon, if any, and the proportion thereof for which the said respondents are liable under the terms of said Agreement", respectfully reports unto your Honour, that he has examined the proceedings in this cause, together with the papers in the case of Munich Reinsurance Company vs. United Surety Company in the Circuit Court of Baltimore City, Docket A-177-1907, and the papers in the case of Thomas H. Bowles, et al, vs. United Surety Company, in the Circuit Court of Baltimore City, Docket A-19-1911, and based upon these proceedings, together with the decision of the Court of Appeals of Maryland, in the case of Munich Re-
(244) insurance Company vs. United Surety Company, 121 Md. 479, and stipulations or agreements of the Solicitors of the parties, copies of which have been exhibited to

the Special Master, the Account. in the following form is stated:

ACCOUNT

DR. DISBURSEMENTS OR CHARGES

To the United Surety Company for amounts properly chargeable against the Participation Contract in accordance with Article XIII thereof, between the United Surety Company and Munich Reinsurance Company, in evidence in this case, the figures being furnished the Special Master in the Stipulations and Agreements of the Soliciters of the parties,

viz.:

1. *Return premiums and Rebates*	$167412.67	
Less amount omitted shown in first stipulation on page 3, marked "Class L", ...	3000.00	
		$164412.67
2. *Reinsurance Premiums*		1693.18
3. *Claims* paid by the United Surety Company or the Receivers thereof		$166105.85
(245) To am't br't forward		$166105.85
or finally allowed in the Auditor's Account in the case of Bowles vs. United Surety Company, pending in the Circuit Court of Baltimore City:		
Shown in first stipulation	$590178.00	
And	26285.85	
Shown in subsequent stipulation	29802.77	
And	15529.23	
		661795.85
4. *Commissions, Brokerage and Taxes*		19352.37

5. *Legal fees and Expenses,* incurred by the United Surety Company or its Receivers....		103459.42
Total disbursements or expenses for which the United Surety Company is entitled to credit under Participation Contract		950713.49

(246)

Cr. RECEIPTS

By amount of income with which the United Surety Company is chargeable in connection with the Participation Contract in accordance with Article XIII thereof, between the United Surety Company and the Munich Reinsurance Company, in evidence in this case, the figures being furnished the Special Master, in the Stipulations and Agreements of the Solicitors of the parties, viz.:		
1. *Gross Premiums*	$139741.66	
2. *Reserve for Claims,* as shown in Auditor's Account filed 17th July 1913, in Munich Reinsurance Company vs. United Surety Company, Circuit Court of Baltimore City, ratified on 26th September, 1913	242420.34	
Total receipts with which the United Surety Company is chargeable under Participation Contract		$382162.00
By excess Disbursements or charges over Income		568551.49
Total		$950713.49

Under the terms of the Participation Contract the Respondents are liable to the Complainants for one-third of the excess of Disbursements or Charges over Income, (247) established as above at $568551.49. The Respondents are therefore indebted to the Complainants in the sum of $189517.16. No attempt has been made by the Special Master to ascertain the interest, if any, on the indebtedness.

Respectfully submitted,

EDW. GUEST GIBSON,
Special Master.

Filed herewith is the original Stipulation of the Solicitors of the Parties and a copy of the Supplemental Stipulation. The Special Master also returns the typical cases marked "Class A to L" inclusive, making up the $67,495.08 of disputed allowances under the head of "Return Premiums and Rebates."

STIPULATION OF AGREEMENT OF SOLICITORS OF THE PARTIES FILED WITH THT SPECIAL MASTER.

(248) Filed 9th November, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, a corporation.

The Court having passed its decree herein dated the 30th day of January, 1922, whereby the papers in the

case were referred to Edward Guest Gibson, Special Master, "to state an account of the business of the United Surety Company participated in by the Munich Reinsurance Company under the terms of the Participation Agreement in evidence in this cause from January 1, 1911, to the date of the decree, said account to show the amount of loss thereupon, if any, and the proportion thereof for which the said respondents are liable under the terms of the said agreement", and the parties hereto desiring to facilitate the accounting referred to, agree for all the purposes of this case before the District Court or on any appeal or writ of error as follows:

(1) Reserve for unadjusted claims as shown on the account between the United Surety Company and the Munich Reinsurance Company, confirmed by the Circuit Court of Baltimore City on September 26, 1918, in the case of the Munich Reinsurance Company vs. United Surety Company, was $242,420.34, with respect to which (249) item, however, the Munich Reinsurance Company claims that interest should be allowed by the United Surety Company at the rate of six per cent from the 3rd day of October, 1913, the date of the payment under the decree entered by the Circuit Court of Baltimore City, on the amount then paid, to-wit, $78,154.61.

The Plaintiffs deny the above claim for interest.

(2) Gross premiums charged since January 1, 1911, on all business participated in by the Munich Reinsurance Company amounted to $139,741.66.

(3) The Plaintiffs claim and the Defendants deny a credit of $167,412.67 as "Return Premiums and Rebates" allowed since January 1, 1911. The Respondents admit that $99,917.59 of the aforesaid sum was properly allowed in an insurance and technical sense as return premiums, but Respondents claim that so much of said sum of $99,917.59 as may have been allowed and paid by the Receivers in respect to business prior to January 1, 1911, is not properly chargeable in the account in dispute.

As to the remaining part of said claim of $167,412.67, namely, $67,495.08, the Respondents dispute the propriety of the allowance of any part thereof, claiming as to the whole of said amount that the so-called "Return

Premiums and Rebates" represented thereby are not in fact or in law "Return Premiums and Rebates" in an insurance sense and within the meaning of the term as used in the Participation Contract.

It is agreed that the $67,495.08 of disputed allowances are made up of classes of cases, of which the cases hereto (250) attached are typical.

That allowances of the general charter

of Class A	were	$ 8,000.00
of Class B	"	6,000.00
of Class C	"	5,000.00
of Class D	"	5,000.00
of Class E	"	10,000.00
of Class F	"	8,000.00
of Class G	"	4,000.00
of Class H	"	2,000.00
of Class I	"	10,000.00
of Class K	"	6,495.08
of Class L	"	3,000.00

That either party may adduce evidence before the Commissioner concerning any or all of the cases above classified and the question whether the return premiums allowed under each classification are properly chargeable in the account shall be submitted to the Court subject to the right of appeal after final ratification of the account of the Special Commissioner.

It is agreed that if the cases under any class or classes are properly chargeable in the account, the total amount of such charges shall be the amount or amounts above set forth with respect to the class or classes so decided to be chargeable, and similarly, if such cases are held to be not properly chargeable in the account, the said account shall be diminished by the amount or amounts above set forth with respect to such class or classes as shall be held not to be properly chargeable in the account between the parties.

It is also agreed that 75% of the above $167,412.67 of return premiums were allowed on bonds on which the

premiums were charged prior to January 1, 1911, and (251) credits therefor given in the account ratified in the State Court and 25% thereof on bonds on which the premiums were charged after January 1, 1911, and credit therefor is given in the item of income in this account—"Gross premiums charged since January 1, 1911, on all business participated in by the Munich Reinsurance Company"; and with respect to the aforesaid 75% of return premiums allowed on bonds on which the premiums were charged prior to January 1, 1911, it is claimed by the Munich Reinsurance Company that all questions relating to the same were finally and completely disposed of in the settlement had between the parties under the proceedings in the State Court and the settlement had in accordance therewith, and that the same is, therefore, *res adjudicata*, and that the Plaintiffs are now estopped to make any claim in respect thereto.

(4) Premiums on reinsurance paid or allowed by the United Surety Company since January 1, 1911, on business participated in by the Munich Reinsurance Company, were $1,693.18.

(5) Claims paid by the United Surety Company or the Receivers thereof or finally allowed in the Auditor's accounts, in the case of Bowles, et al, vs. United Surety Company, pending in the Circuit Court of Baltimore City, in which the Receivership of the United Surety Company is administered, which claims are based on bonds or policies participated in by the Munich Reinsurance Company, less salvage and reinsurance in other companies. It is agreed that items properly chargeable under this heading amount to $590,178.00, and in addition thereto the Plaintiffs claim $26,285.85 as a loss, and, therefore, (252) to be added to the said figure of $590,178.00. It is further agreed that the transaction out of which this item of $26,285.85 grew is as follows:

A man named Nicoll undertook to improve real estate on York Road in Baltimore County, and purchased a tract subject to a purchase money mortgage for substantially the value of the land, containing the privilege of releasing lots at a fixed figure. Nicoll started to improve this property and gave second mortgages on the lots to various investors, the United Surety Company giving its bond to the investor in each instance that Nicoll would build on the lots so mortgaged a house cost-

ing not less than a definite fixed sum. Nicoll soon found that the actual cost of a cottage greatly exceeded the estimated cost and after he had completed a number of such cottages was completely insolvent; the United Surety Company had issued bonds to the individuals named on the Exhibit to the Receivers' Account, filed with the petition herein, guaranteeing them the completion of the improvements. The United Surety Company thereupon, in order to relieve its bond, bought these second mortgages during the years 1909 and 1910 and carried them on its books as an asset. The Receivers charged them off as a loss on June 21, 1911. The property was later sold under the first mortgage and very little salvage realized. The salvage which was realized is accounted for in the account.

The question presented is whether this item of $26,285.85 is properly chargeable in the account as a loss. The bonds were surety bonds written during the period from 1906-1910, and the account with the Munich, ratified by the State Court, gave credit for the premiums paid (253) therefor.

(6) Commissions and brokerage and taxes allowed or paid since January 1, 1911, on premiums credited on this account or on the account stated between the United Surety Company and the Munich Reinsurance Company and ratified by the Circuit Court of Baltimore City on September 26, 1913, amounting to $19,352.37.

Respondents contend that as to so much of said amount as represents premiums charged prior to January 1, 1911, (which it is agreed amounted to 75% thereof) the same should be eliminated for the reasons particularly set forth above in connection with the third section of this agreement.

Respondents further contend that as to so much of said amount as represents premiums charged subsequent to January 1, 1911, the same should not in equity be charged against it in the present account.

(7) Legal fees and expenses incurred by the United Surety Company or the Receivers thereof since January 1, 1911, in auditing, adjusting or contesting claims based on bonds or policies of the United Surety Company, included in business participated in by the Munich Reinsurance Company, amounted to $103,459.42.

It is understood that the above agreement is made without prejudice to the right of either party to raise any point in connection with the case, except that the
(254) correctness of the figures herein set forth shall at no time be disputed.

JANNEY, STUART & OBER,
Solicitors for Receivers of the United Surety Company, Plaintiffs.

ISAAC M. MEEKINS,
Solicitor for Thomas W. Miller, Alien Property Custodian.

R. E. LEE MARSHALL,
Solicitor for Munich Reinsurance Company.

SUPPLEMENTAL STIPULATION OR AGREEMENT OF THE PARTIES FILED WITH THE SPECIAL MASTER.

(255) Filed 9th November, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Francis P. Dobbin, (Thomas W. Miller, Alien Property Custodian) and Munich Reinsurance Company.

In connection with stipulation heretofore filed in this case, it is agreed between the parties through their respective solicitors, for all purposes of this case or on any appeal:

1. That the claims against the United Surety Company listed on the statement of claims filed with the Bill of Complaint as "Schedule of Claims against which reserve must be maintained by the United Surety Company", aggregating $186,569.65, have now been disposed of and have resulted in establishing the validity of the following claims which should be added to the amounts agreed to in the fifth paragraph of the stipulation heretofore filed as claims paid by the United Surety Company or the Receivers thereof, or finally allowed in the auditors' accounts, in which the receivership of the United Surety Company is administered:

Claim of Sanitary District of Chicago.....$29,802.77
Claim of the City of Nashville.....$15,529.23

2. It is further agreed that no liability attaches to the Munich for any further claims on said list, except (256) that the Receivers reserve pursuant to the opinion of this Court, the right to claim under the reservation to be provided for at the end of any decree passed herein the Munich's proportionate share of any claim that may be effectively established against them on account of the following claims now pending:

Claim of J. G. White & Company, pending in the United States District Court for the District of Connecticut, possible liability.... $25,000.00

Claim No. 835 of Mayor and City Council of Baltimore against J. F. Gantz and Company.. 345.29

Claim No. 836 of Mayor and City Council of Baltimore against the Gantz Construction Company 27,234.54

Claim No. 837 of Mayor and City Council of Baltimore against the Gantz Construction Company 14.65

The above three claims of the Mayor and City Council of Baltimore are pending against the principal in the Court of Common Pleas of Baltimore City and if the prin-

cipal shall successfully defend or discharge said claims, no liability can be attached to the Munich.

JANNEY, STUART & OBER
Solicitors for Receivers of the United Surety Company

HARTWELL CABELL,
Solicitor for Thomas W. Miller, Alien Property Custodian.

R. E. LEE MARSHALL
Solicitor for Munich Reinsurance Company.

EXCEPTIONS ON THE PART OF THE DEFENDANT THE MUNICH REINSURANCE COMPANY TO THE REPORT AND ACCOUNT OF THE SPECIAL MASTER.

(257) Filed Dec. 2, 1922.

The Defendant, the Munich Reinsurance Company, excepts to the Report and Account filed herein by Edward Guest Gibson, Special Master, and to the items of said Report and Account more particularly referred to below.

As to the item "Reserve for Unadjusted Claims", the Defendant excepts to the statement thereof as shown in said Report and Account for the reason that the same fails to charge the United Surety Company with interest at the rate of six per cent (6%) from the 3rd day of October, 1913, the date of the payment under a decree entered by the Circuit Court of Baltimore City on the amount then paid by the Munich Reinsurance Company to the United Surety Company, to-wit, $78,154.61.

As to Item 3 of said Report and Account, the Defendant
(258) excepts thereto for the following reasons:

In and by said Item 3 there is allowed to the United Surety Company a credit of $167,412.67 as "Return Premiums and Rebates" allowed since January 1, 1911.

As to $99,917.59 of the aforesaid sum, the Defendant excepts to the allowance thereof or so much thereof as the proceedings in this case show was allowed and paid by

the Receivers in respect to business prior to January 1, 1911. As to so much of said sum so paid as aforesaid, to-wit, seventy-five per cent (75%) thereof, the Defendant excepts to the allowance of the same or any part thereof in the said Report and Account.

The Defendant further excepts to Item 3 of said Report and Account for the reason that it contains a further allowance of $67,495.08 under the title "Return Premiums and Rebates", whereas no part of the same were or are in fact or in law "Return Premiums and Rebates" within the meaning of the term as used in the contract between the parties, and, therefore, that no part of the same should have been allowed in said Report and Account.

The Defendant further excepts to Item 3 of said Report and Account for the reason that the same contains allowances of the following classes as indicated in the Stipulation and Agreement of Counsel referred to in said Report and Account:

Class A	$8,000.00
Class B	6,000.00
Class C	5,000.00
Class D	5,000.00
(259) Class E	$10,000.00
Class F	8,000.00
Class G	4,000.00
Class H	2,000.00
Class I	10,000.00
Class K	6,495.08

The Defendant further excepts to the allowance of said item of "Return Premiums and Rebates" for the reason that, as appears by the Stipulation and Agreement of Counsel referred to in said Report and Account, seventy-five per cent (75%) thereof were allowed on bonds on which the premiums were charged prior to January 1, 1911; wherefore, no part thereof is or was properly allowable in the said Report and Account.

The Defendant further excepts to said Report and Account in that the same allows an item of $26,285.85 under the heading of "Claims Paid" by the United Surety Company, whereas, in fact and in law, no part of said $26,285.85 should have been allowed or charged.

The Defendant further excepts to said Report and Account as a whole for the reason that the same purports to ascertain a liability on the part of the Defendant, the Munich Reinsurance Company, whereas, in fact and in law, no such liability exists as to any part or portion of the claim sued on in this case.

R. E. L. MARSHALL
Solicitor for Munich Reinsurance Company.

OPINION OF COURT.

(260) Filed 7th December, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. IN EQUITY.

EDWIN W. POE, et al.,
Receivers of the United Surety Company

vs.

MUNICH REINSURANCE COMPANY, a corporation

and

FRANCIS P. GARVEN, (Thomas W. Miller) Alien Property Custodian.

ROSE, District Judge:

Upon coming in of the Special Master's Report directed by the Decree of this Court passed on the 30th day of January, last, the respondents filed a number of exceptions.

The first is as to the failure of the Special Master to credit the Munich Reinsurance Company with interest on the sum of $78,154.61 from October 3, 1913, when it paid that sum under a Decree entered by the Circuit Court of Baltimore City. Frankly I am unable to under-

stand upon what this exception is based. That money was directed them to be paid, and was then due. The exception is overruled.

The next exception is to the allowance for return premiums in respect to business prior to January 1, 1911. This exception is on the theory that an allowance for this sum should have been included, if it was not, in the decree of the Circuit Court of Baltimore City, heretofore mentioned, and all claims on account of it are consequently res adjudicata. As a matter of fact, none of these premiums, as I understand it, were returned or allowed for until after the period of accounting covered by the decree in question. The exceptions therefore cannot be sustained.

(261) The third exception is to the allowance of the sum of $67,495.08 as return premiums and rebates, because, as the exceptants say, they were not properly "returned" premiums, but were "uncollected" premiums. The plaintiffs offered evidence to show that in the dealings of insurance companies, of the class of those here before the Court, unpaid premiums are classed as return premiums and rebates. The defendants offered no testimony to the contrary, although they had ample opportunity to do so if they saw fit, and I am therefore constrained to accept that put in by the plaintiff as uncontradicted. There is nothing in it unreasonable in itself. The third exception is therefore overruled.

The succeeding ten exceptions severally deal with items included in the above mentioned $67,495.08, specifying particular objections to each of the items. I have examined the evidence upon the items included in these ten exceptions, and am of the opinion that the Master was right concerning each and every one of them. So far as the evidence disclosed, the United Surety Company, or its receivers, made all reasonable effort to collect the premiums in question and made all the effort and incurred all the expense in the matter that any reasonable prudent person, acting for himself and another, would have been justified in doing or incurring.

The remaining specific exception is as to the allowance of $26,285.85. There the Surety Company was surety on certain completion bonds. The principal defaulted, and the Surety Company had to take over the property. For a while it carried its equity in the property on its books at a figure $26,285.85 in excess of the sum that it

actually realized from the property. I see no reason why this particular bookkeeping entry should have the effect respondents would give to it. The loss was incurred on a surety bond written during the period of the contract, and that is all there is of it.

There is a general exception to the allowance of any-
(262) thing to the plaintiff, which, as I understand, again raises the question of the correctness of the decree passed some eleven months ago. If there is error in that, it will have to be corrected elsewhere.

It follows that all the exceptions are overruled and the Master's report will be ratified and confirmed.

FINAL DECREE.

(263) Filed 6th December, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. IN EQUITY.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company,

vs.

Munich Reinsurance Company, a corporation, and

Francis P. Garven (Thomas W. Miller) Alien Property Custodian.

This Court, having by its Decree, dated the 30th day of January, 1922, referred the papers in this case to Edward Guest Gibson, Special Master, to state an account of the business of the United Surety Company participated in by the Munich Reinsurance Company under the terms of the Participation Agreement in evidence herein from January 1, 1911, to the date hereof, said account to show the amount of loss thereupon, if any, and the proportion thereof for which the respondents are liable

under the terms of said Participation Agreement, said account to be stated on the theory and in the manner further set forth in said decree of January 30, 1922.

And the said Special Master having made his report to this Court on the 9th day of November, 1922, showing the amount of loss upon the business of the United Surety Company participated in by the Munich Reinsurance Company under the terms of the said Participation Agreement from January 1, 1911, to date to be $568,551.49, and further showing the proportion thereof for which the said respondents are liable under the terms of said agreement to be one-third thereof, or the sum of $189,517.16.

And the said Thomas W. Miller, Alien Property Custodian having been substituted by agreement in open Court (264) as a party defendant herein for Francis P. Garvan Alien Property Custodian, and it being admitted by the Answer and other proceedings herein that the said Thomas W. Miller, Alien Property Custodian, has in his custody moneys assigned and delivered to him by the said Munich Reinsurance Company exceeding the amount of the claim of the said complainants.

And exceptions to the report of the said Special Master having been herein filed by the Respondent, the Munich Reinsurance Company, on the 2nd day of December, 1922, and said exceptions having come on to be heard in the presence of the solicitors for the respective parties, and the evidence and stipulations of counsel having been by the Court read and considered and argument of counsel heard, it is this 6th day of December in the year 1922, by the United States District Court for the District of Maryland--

ADJUDGED, ORDERED and DECREED

1. That the exceptions of the respondent, Munich Reinsurance Company, to the Report of the Special Master, be and they are hereby dismissed, and the Report of the said Special Master be and it is hereby in all respects ratified and confirmed.

And it is further—

ADJUDGED, ORDERED and DECREED

that Thomas W. Miller, Alien Property Custodian, do

pay to Edward W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, or to their solicitors of record, the sum of $189,517.16, together with interest from the 30th day of January, 1922, and the costs of this proceeding, including a fee of $250.00 to be paid to the Special Master and to be taxed as a part of the costs.

And it is further—

ADJUDGED, ORDERED and DECREED

(265) that this Court retain jurisdiction of this cause to determine the amount, if any, for which the respondents may become liable to the complainants on account of the following claims, to-wit:

Claim of J. G. White & Company on account of a proceeding pending in the United States District Court for the District of Connecticut.

Claim No. 835 of the Mayor & City Council of Baltimore City against J. F. Gantz & Company, pending in the Court of Common Pleas of Baltimore City.

Claim No. 836 of the Mayor & City Council of Baltimore City against the Gantz Construction Company, pending in the Court of Common Pleas of Baltimore City.

Claim No. 837 of the Mayor and City Council of Baltimore City against the Gantz Construction Company pending in the Court of Common Pleas of Baltimore City.

And upon the ascertainment of such liability to pass such further or supplemental decree herein as to the Court may seem proper.

JOHN C. ROSE,
U. S. District Judge.

STIPULATION OF COUNSEL AS TO MAKING UP RECORD ON APPEAL.

(266) Filed 1st February, 1923.

It is hereby stipulated and agreed by and between the parties to this cause that the transcript of record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit in said cause shall consist of the following, viz:

1. Bill of Complaint.

1a. Orator's Exhibit Re-insurance Agreement.

2. Petition to institute proceedings against Alien Property Custodian and Order of Court thereon.

3. Order of Court extending time for Alien Property Custodian to file answer.

4. Answer of Francis P. Garvan, Alien Property Custodian.

5. Answer of the Munich Reinsurance Company.

6. Testimony of Ernest W. Clark and Stuart S. Janney.

7. Depositions of Roland Benjamin.

8. Stipulation and agreement as to facts, and three opinions of Court of Appeals of Maryland attached thereto, and Auditor's account dated July 17, 1913. Also receipt of Receivers dated Oct. 2, 1913.

9. Opinion of Court, filed 27 Decr. 1921.

10. Decree of Court referring the papers in this case to Edward Guest Gibson, Special Master, to state an account.

11. Report of Special Master and stipulations of counsel.

12. Exceptions to Report of Special Master.

13. Opinion of Court, filed 7 Dec. 1922.

14. Final Decree.

14½. This Stipulation.

15. Assignment of errors.

16. Memorandum of the Clerk.

17. Clerk's Certificate.

And it is further stipulated and agreed that the Clerk (267) of this Court shall make up a transcript of the record in this case, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, and that the same be printed in accordance with Rule 23 of that Court.

JANNEY, STUART & OBER,
STUART S. JANNEY,
Solicitor for Plaintiff-Appellee.

DANIEL O. HASTINGS,
Solicitor for Defendant-Appellant.

R. E. LEE MARSHALL,
HARTWELL CABELL,
Solicitor for Defendant-Appellant.

ASSIGNMENT OF ERRORS.

(268) Filed 1st February, 1923.

And now comes THOMAS W. MILLER, Alien property Custodian, and the MUNICH REINSURANCE COMPANY, Appellants, and make and file this their Assignment of Errors.

1. That the Court erred in refusing and failing to dismiss the bill or petition filed in the above-entitled case, in its entirety, for the reason that the acts and

conduct of the Plaintiff, as shown by the undisputed evidence in the case, operated to discharge the Defendants and each of them from any and all liability in respect to the matters complained of.

2. The Court erred in refusing to dismiss the complaint in its entirety for the reason that the admitted insolvency of the Plaintiff, under the circumstances shown in evidence, operated to discharge the Defendants and each of them from any and all liability in the premises.

3. The Court erred in refusing to hold that the con-
(269) tract sued on in this case was terminated, rescinded, cancelled and annulled by and through the default of the Plaintiff, and that accordingly Plaintiff was not entitled to maintain any action upon said contract or to have any recovery or accounting thereunder.

4. The Court erred in holding that the Plaintiff was entitled to an accounting and recovery under and upon the contract sued upon in this case.

5. The Court erred in refusing to hold that the Plaintiff was estopped to maintain any action or to have any accounting or recovery under the contract sued upon in this case.

6. The Court erred in refusing to hold that the Plaintiff was entitled to recovery under said contract, if at all, then only to the extent and in the case of claims actually paid by the Plaintiff and covered by the contract sued upon in this case.

7. The Court erred in holding that the Plaintiff was entitled to recover under the contract sued upon in this case in respect to claims covered by said contract between the parties and which the Plaintiff had not first paid.

8. The Court erred in refusing to hold that the right of the Plaintiff to recover, if at all, against the Defendants, or either of them, upon claims covered by the contract in this case, was conditional upon the fact and amount of payments made by the Plaintiff in settlement of said claims.

9. The Court erred in failing to charge the United
(270) Surety Company with interest at the rate of 6% from the 3rd day of October, 1913, on the sum of Seventy-eight Thousand One Hundred and Fifty-four Dollars and Sixty-one Cents ($78,154.61), being the amount paid by the Munich Reinsurance Company to the United Surety Company under a decree entered by the Circuit Court of Baltimore City.

10. The Court erred in refusing to strike out of the account between the parties in this case, and in allowing the United Surety Company credit in said account, the sum of One Hundred Sixty-seven Thousand, Four Hundred and Twelve Dollars and Sixty-seven Cents ($167,412.67) under the item "Return Premiums and Rebates", for the reason that as to Ninety-nine Thousand, Nine Hundred and Seventeen Dollars and Fifty-nine Cents ($99,917.59) of said amount, the same was allowed and paid by the Receivers in respect to business prior to January 1, 1911, and, therefore, no part of said amount was properly allowable in the account stated in the present proceeding; and as to Sixty-seven Thousand Four Hundred and Ninety-five Dollars and Eight Cents ($67,495.08) of said item of "Return Premiums and Rebates", no part of the same was, in fact or in law, "Return Premiums and Rebates" within the meaning of the term as in the contract between the parties, and, therefore, no part of the same was properly allowable in said Report and Account filed in this proceeding.

11. The Court erred in allowing the United Surety
(271) Company credit in the Report and Account filed in this case under the heading of "Claims Paid by the United Surety Company", an item of Twenty-six Thousand Two Hundred and Eighty-five Dollars and Eighty-five Cents ($26,285.85), and in failing to strike out said item from said account, for the reason that neither said item nor any part thereof was, in fact and in law, allowable or chargeable under the heading "Claims Paid", or otherwise.

12. The Court erred in overruling the exceptions filed by the Defendant Munich Reinsurance Company to the Report and Account of the Special Master, and in ratifying and confirming said Report and Account.

13. The Court erred in holding that the Plaintiff was entitled to recover any amount in this case, and in failing to hold that the Plaintiff was estopped, by reason of the circumstances shown in evidence, from having or maintaining any action or right of recovery against the Defendants, or either of them, in this proceeding.

R. E. LEE MARSHALL,
HARTWELL CABELL,
Solicitors for Munich Reinsurance Company, Appellant.

DANIEL O. HASTINGS,
Solicitor for Thomas W. Miller, Alien Property Custodian, Appellant.

(272)

MEMORANDUM OF THE CLERK.

(1) Petition of Thomas W. Miller, Alien Property Custodian for Appeal. filed 1st February, 1923.

(2) Petition of Munich Reinsurance Company for Appeal filed 1st February, 1923.

(3) Appeals allowed 1st February, 1923.

(4) Citation. Dated 1st day of February, 1923. (Acknowledgment of service, dated 13th day of February, 1923).

ORDER TO TRANSMIT RECORD.

And, thereupon, it is ordered by the Court here, that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Test:

ARTHUR L. SPAMER,
Clerk.

(273)

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
District of Maryland, to-wit:

I, ARTHUR L. SPAMER, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause, made up in accordance with stipulation of counsel for the respective parties filed in said cause.

IN TESTIMONY WHEREOF I hereunto set my hand and affix the seal of said District Court, this 14th day of February, 1923.

ARTHUR L. SPAMER,
Clerk.

(Seal)

On the same day, to-wit, February 15, 1923, the original petitionsfor appeal, order allowing appeal and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Daniel O. Hastings, Hartwell Cabell and R. E. Lee Marshall is entered for the appellants.

February 17, 1923, the appearance of Joseph C. France, J. Kemp Bartlett and Stuart S. Janney is entered for the appellees.

April 7, 1923, twenty-five copies of the printed record are filed.

STIPULATION AS TO BRIEFS.

Filed April 16, 1923.

It is stipulated and agreed by and between counsel for the respective parties that the time for filing Appellants' brief should be extended until Monday, April 30, 1923, and that the time for filing appellees' brief should be extended until May 10, 1923.

DANIEL O. HASTINGS,
Counsel for Alien Property Custodian.

R. E. LEE MARSHALL,
Counsel for Munich Reinsurance Company.

STUART S. JANNEY,
Counsel for Receivers of the United Surety Company.

ARGUMENT OF CAUSE.

May 16, 1923, (May Term, 1923) cause came on to be heard before Woods and Waddill, Circuit Judges, and McDowell, District Judge, and is argued by counsel and submitted.

OPINION.

Filed November 6, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS

FOURTH CIRCUIT.

No. 2098.

THOMAS W. MILER, Alien Property Custodian, and MUNICH REINSURANCE COMPANY,
Appellants,

versus

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK and J. KEMP BARTLETT, Receivers of the UNITED SURETY COMPANY,
Appellees.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

(Argued May 16, 1923. Decided November 6, 1923.)

Before WOODS and WADDILL, Circuit Judges, and McDOWELL, District Judge.

HARTWELL CABELL, R. E. LEE MARSHALL and DANIEL O. HASTINGS for Appellants, and STUART S. JANNEY and JOSEPH C. FRANCE (J. KEMP BARTLETT on brief) for Appellees.

PER CURIAM:

The decree in this cause is affirmed for the reasons stated in the opinions of the District Judge.

Affirmed.

DECREE.

Filed and Entered November 9, 1923.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

No. 2098.

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants,

vs.

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees.

APPEAL from the District Court of the United States for the District of Maryland.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the de-

cree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs.

C. A. WOODS,
U. S. Circuit Judge.

November 9, 1923.

On another day, to-wit, December 10, 1923, the mandate of this Court, in this cause, is issued and transmitted to the United States District Court at Baltimore, Maryland, in due form.

Same day, the original petitionsfor appeal and order allowing appeal are returned to the Clerk of the District Court at Baltimore, Maryland.

PETITION FOR APPEAL.

Filed January 7, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants,

versus

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees.

The above named appellants, Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, respectfully show that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Fourth Circuit, and that a judgment has therein been rendered on the sixth day of November, 1923, affirming the decree of the District Court of the United States for the District of Maryland; that the jurisdiction of the District Court depended upon the fact that the proceeding was one instituted under the provisions of

Section 9 of the Trading wtih the Enemy Act, originally enacted October 6, 1917, C. 106, 40 Stat. 411, and the acts amendatory thereof: that the cause is not one in which the decree of the Circuit Court of Appeals is made final, and is a cause in which the amount in controversy exceeds one thousand dollars ($1000.) besides costs.

WHEREFORE, the Appellants both pray that an appeal be allowed them in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, to send the record and proceedings in said cause, with all things concerning the same to the Supreme Court of the United States, to the end that the errors complained of in the assignment of errors herewith filed by the said Appellants, may be reviewed to the end that the errors therein may be corrected.

And your petitioners further pray for a *supersedeas* of said decree, and for such other process as is required to perfect the Appeal.

DANIEL O. HASTINGS,
Solicitor for Alien Property Custodian,
Appellant,

HARTWELL CABELL,
Solicitor for Munich Reinsurance Co.,
Appellant,

ASSIGNMENT OF ERRORS.

Filed January 7, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants,

versus

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees.

The appellants, Thomas W. Miller, Alien Property Custodian, and the Munich Reinsurance Company, in connection with their petition for appeal, herein present and file herewith their assignment of errors, as to which matters and things they say that the decree entered herein, on the Sixth day of November, 1923, is erroneous, to-wit:

1. The Court erred in refusing and failing to dismiss the bill or petition filed in the above entitled case, in its entirety, for the reason that the acts and conduct of the appellees, as shown by the undisputed evidence in the case, operated to discharge the appellants, and each of them, from any and all liability in respect to the matters complained of.

2. The Court erred in refusing to dismiss the complaint in its entirety for the reason that the admitted insolvency of the United Surety Company, under the circumstances shown in evidence, operated to discharge the appellants and each of them from any and all liability in the premises.

3. The Court erred in refusing to hold that the contract sued on in this case was terminated, rescinded, cancelled and annulled by and through the default of the United Surety Company and that accordingly appellees were not entitled to maintain any action upon said contract or to have any recovery or accounting thereunder.

4. The Court erred in holding that the appellees were entitled to an accounting and recovery under and upon the contract sued in this case.

5. The Court erred in refusing to hold that the appellees were estopped to maintain any action or to have any accounting or recovery under the contract sued upon in this case.

6. The Court erred in refusing to hold that the ap-

pellees were entitled to recover under said contract, if at all, then only to the extent and in the case of claims actually paid by the appellees and covered by the contract sued upon in this case.

7. The Court erred in holding that the appellees were entitled to recover under the contract sued upon in this case in respect to claims covered by said contract between the parties and which the appellees had not first paid.

8. The Court erred in refusing to hold that the right of the appellees to recover, if at all, against the appellants, or either of them, upon claims covered by the contract in this case, was conditional upon the fact and amount of payments made by the appellees in settlement of said claims.

9. The Court erred in failing to charge the United Surety Company with interest at the rate of six per cent from the Third day of October, 1913, on the sum of Seventy-eight Thousand One Hundred Fifty-four Dollars and Sixty-one Cents, ($78,154.61), being amount paid by the Munich Reinsurance Company to the United Surety Company under a decree entered by the Circuit Court of Baltimore City.

10. The Court erred in refusing to strike out of the account between the parties in this case, and in allowing the United Surety Company credit in said account, the sum of One Hundred Sixty-seven Thousand Four Hundred Twelve Dollars and Sixty-seven Cents ($167,412.67) under the item "Return Premiums and Rebates", for the reason that, as to Ninety-nine Thousand Nine Hundred Seventeen Dollars and Fifty nine Cents ($99,917.59) of said amount, the same was allowed and paid by the receivers in respect to business prior to January 1, 1911, and, therefore, no part of said amount was properly allowable in the account stated in the present proceeding; and as to Sixty-seven Thousand Four Hundred Ninety-five Dollars and Eight Cents ($67,495.08) of said item of "Return Premiums and Rebates", no part of the

same was, in fact or in law, "Return Premiums and Rebates", within the meaning of the term, as in the contract between the parties, and, therefore, no part of the same was properly allowable in said report and account filed in this proceeding.

11. The Court erred in allowing the United Surety Company credit in the report and account filed in this case under the heading of "Claims Paid by the United Surety Company", an item of Twenty-six Thousand Two Hundred Eighty-five Dollars and Eighty-five Cents ($26,285.85), and in failing to strike out said item from said account, for the reason that neither said item, nor any part thereof, was, in fact and in law, allowable or chargeable under the heading "Claims Paid", or otherwise.

12. The Court erred in over-ruling the exceptions filed by the appellant, Munich Reinsurance Company, to the report and account of the Special Master, and in ratifying and confirming said report and account.

13. The Court erred in holding that appellees were entitled to recover any amount in this case and in failing to hold that the appellees were estopped by reason of circumstances shown in the evidence from having or maintaining any action for right of recovery against the appellants, or either of them, in this proceeding.

WHEREFORE, the appellants pray that said decree may be reversed and that the appellants may have an adjudication and decree in their favor, as herein specified.

DANIEL O. HASTINGS,
Solicitor for Thomas W. Miller,
Alien Property Custodian,
Appellants.

HARTWELL CABELL,
Solicitor for Munich Reinsurance Company,
Appellants.

ORDER ALLOWING APPEAL.

Filed January 7, 1924.

UNITED STATES CIRCUIT COURT OF APPEALS

Fourth Circuit.

Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants,

versus

Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees.

Application having been made by Thomas W. Miller, Alien Property Custodian, in which the Munich Reinsurance Company has joined for an order allowing an appeal to the Supreme Court of the United States, in the above entitled proceedings, and praying that the decree herein be superseded pending the final determination of the appeal; and it appearing that the Alien Property Custodian is an officer of the Government and that the funds and property in controversy is now in his custody, and which, under the provisions of the Act known as Trading with the Enemy, cannot in this instance be paid out except under a decree of a Federal Court, that no bond or security is or ought to be required from said Alien Property Custodian, it is,

ORDERED, that the appeal herein prayed for is allowed, which shall operate as a *supersedeas;* said Order shall become effective upon the filing of a bond by the Munich Reinsurance Company in the sum of $1000.00, to be approved by a judge of this Court, to cover the costs as required by law.

DATED: January, 7'' 1924.

EDMUND WADDILL, JR.,
Judge United States Circuit Court
of Appeals, Fourth Circuit.

CITATION.

Issued January 7, 1924.

THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Fourth Circuit.

TO Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days after date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, are appellants and you are appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said appeal mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable EDMUND WADDILL, JR., Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 7th day of January, 1924.

EDMUND WADDILL, JR.,
Judge United States Circuit Court
of Appeals, Fourth Circuit.

Legal service of the above citation is hereby accepted this 10th January, 1924.

STUART S JANNEY,
Attorney for Edwin W. Poe, et al.,
Receivers of the United Surety Company.

APPEAL BOND.

Filed January 21, 1924.

KNOW ALL MEN BY THESE PRESENTS, That we, Munich Reinsurance Company, as principal, and THE AETNA CASUALTY AND SURETY COMPANY of Hartford, Connecticut, as surety, are held and firmly bound unto Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, in the full and just sum of One Thousand ($1,000.) Dollars, to be paid to the said Edwin W Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 18th day of January in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at the November term of the United States Circuit Court of Appeals for the Fourth Circuit, in a suit depending in said Court between Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants, and Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, Appellees, a decree was rendered against the said Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, Appellants, and the said Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Edwin W. Poe, Stuart S. Janney, Ernest J. Clark and J. Kemp Bartlett, Receivers of the United Surety Company, citing and admonishing them to be and appear in the Supreme Court of the United States at the City of Washington, District of Columbia, on the day in the said citation mentioned:

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Thomas W. Miller,

Alien Property Custodian, and Munich Reinsurance Company shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

(Seal)

MUNICH REINSURANCE COMPANY.
By CARL SCHREINER,
Attorney-in-fact.

AETNA CASUALTY & SURETY COMPANY,
By HAROLD C. MEGREW,
Resident Vice-President.

Attest:

(Seal of Surety Co.) THOMAS E. RIORDAN,
Resident Assistant Secretary.

SOUTHERN DISTRICT OF NEW YORK,
City, County & State of New York, ss.:

On this 17th day of January, 1924, before me personally came CARL SCHREINER to me known, who being by me duly sworn did depose and say that he resides in the City of New York. That he is the attorney-in-fact of the Munich Reinsurance Company, the corporation described in and which executed the foregoing instrument. That the said corporation is a foreign corporation organized and existing under the laws of the Bavarian Government. That he signed his name thereto as the attorney-in-fact of said corporation in the United States by virtue of the power and authority in him vested by a power of attorney duly executed by the said corporation.

ADELE V. JUILLERAT,
Notary Public, New York County.
(Seal of Notary.) Clerk's No. 64 Register's No. 4038.

Commission expires March 30, 1924.

Countersigned at Richmond, Va., 1/21/24.

F. W. CLINTSMAN,
Atty. in fact.

Approved:

EDMUND WADDILL, JR.,
Judge U. S. Circuit Court of
Appeals, Fourth Circuit.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss.:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 1st day of February, A. D., 1924.

(Seal)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

Endorsed on cover: File No. 30,126. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 816. Thomas W. Miller, Alien Property Custodian, and Munich Reinsurance Company, appellants, vs. Edwin W. Poe, Stuart S. Janney, Ernest J. Clark, et al., etc. Filed February 15th, 1924. File No. 30,126.

(21)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925

No. 289 34

THOMAS W. MILLER, Alien Property Custodian, and MUNICH REINSURANCE COMPANY,

Appellants,

against

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK and J. KEMP BARTLETT, Receivers, Etc.,

Appellees.

BRIEF FOR APPELLANTS.

DANIEL O. HASTINGS,
Solicitor for Alien Property Custodian.

HARTWELL CABELL,
Solicitor for Munich Reinsurance Company.

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INDEX.

TABLE OF CASES CITED.

AUTHORITIES REFERRED TO.

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No. 816

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Appellants,

against

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK and J. KEMP BARTLETT, Receivers, Etc.,
Appellees.

BRIEF FOR APPELLANTS.

Statement of Case.

This is an appeal from a decree of the Circuit Court of Appeals of the United States, Fourth Circuit, affirming a decree of the United States District Court for the Southern District of Maryland, in equity, wherein exceptions to the report of a Special Master were dismissed, and the sum of $189,517.16, with interest from the 30th day of January, 1922, and costs, were decreed to be paid to appellees (plaintiffs in the District Court).

Statement of Facts.

This suit was commenced by the appellees here, as receivers for the United Surety Company, under §9 of the Trading with the Enemy Act. A claim had been filed with the Alien Property Custodian as required by the Act, against the assets belonging to the Munich Reinsurance Company which had been taken over and were in the Alien Property Custodian's possession. The Munich Reinsurance Company (hereinafter called the Munich), was made party defendant, and under an order of court was served by substituted process, and appeared.

The suit is for an accounting under a contract (Tr. 14), between the United Surety Company of Baltimore (hereinafter referred to as the United), and the Munich.

The United was organized under the laws of Maryland, in the year 1906, as a fidelity and surety company and to transact burglary insurance. During its formative period, negotiations between the promoters of the United and the Munich were had for the purpose of interesting the Munich, then the largest reinsurance company operating in the United States, in the company being formed. These negotiations contemplated the purchase by the Munich, of a number of shares of the capital stock in the United, and a participation agreement between the two companies whereby the Munich should become jointly interested with the United, in certain lines of direct business to be undertaken by the United. These negotiations resulted, in part, in the contract referred to above which forms the basis of this suit, and which was finally agreed upon between the parties, on March 20,

1906, but which, by its terms, became effective as of January 2, 1906. (This contract will hereinafter be referred to as the Participation Contract.)

The United commenced to do business on January 2, 1906. Sometime during the following summer it developed that statements which had been made by its promoters to the Munich and to certain officers and directors of the United, as to the subscription and payment for a large part of its capital stock, were untrue. On August 25, 1906 a special meeting of the board of directors of the United, at which other interested parties attended, was held in Baltimore. At this meeting it developed that of the capital stock of the United which its promoters had represented to the Munich and other interested parties as having been subscribed for and paid (2312½ shares), had, in fact, never been subscribed nor paid for. The Munich had, in addition to entering into the contract referred to, subscribed and paid for a considerable block of the capital stock of the United. This had been done in reliance upon the truth of the representations made to it as to the amount of capital stock in the United actually subscribed and paid for. At the meeting above referred to, and as a result of the disclosures, the representatives of the Munich at first, on behalf of their company, insisted upon a recission of the Munich's subscription to the stock of the United, and demanded that the money paid on account thereof be repaid. Subsequently, at the same meeting, and upon an undertaking on the part of certain persons present, to subscribe and pay for these 2312½ shares of stock as to which the false representations had been made, the Munich with-

drew its recission and agreed to allow its stock subscription to stand.

In October, 1906, upon his return to the United States, Carl Schreiner, manager of the Munich, having for the first time learned the full details of the developments in the affairs of the United, served notice of recission of the contract of January 2, 1906, upon the ground of fraud as disclosed at the meeting of August 25th. This was resisted by the United, which claimed that the action of the representatives of the Munich present at said meeting in electing to continue their subscription to the stock of the United, after knowledge of the fraud, constituted a waiver for all purposes and estopped the Munich from rescinding the participation contract.

In 1907, the Munich sued in the Maryland courts to rescind the contract, and the United counterclaimed for the amount claimed to be due for the first year's operations under the contract. The Maryland courts sustained the contention of the United and denied the Munich the right to rescind, ordering an accounting for the first year's business. (*Munich Reinsurance Co.* v. *United Surety Co.*, 113 Md. 200). The accounting ordered in this suit was not completed until January 13, 1911 (Stipulation XXXI, Tr. 120).

The Participation Contract provides that it shall continue in effect for a period of five years from January 2, 1906, and thereafter stand as tacitly renewed for further period of five years, unless written notice of a desire to terminate the same be given by registered letter from either party one year previous to the expiration of any term of five years (Art. 12 of contract, Tr. 19). By its terms, the first five-year period would end on January 2, 1911, and one year prior to that

date the Munich, in accordance with the provision, served notice, by registered letter, of its intention to terminate the contract as of January 1, 1911.

On December 24, 1910, one Preston, a director and stockholder in the United, applied, in Circuit Court No. 2, Baltimore City, for the appointment of a receiver of the United, upon the ground of insolvency. (Tr. 86-96). The application was resisted by the United on the ground that it was entirely solvent. While the Preston suit was pending, and before action had been taken by the court, one Bowles, who was a director and stockholder in the United, filed a bill in the Circuit Court of Baltimore City (a different Court but with concurrent jurisdiction), alleging that while the company was solvent, its financial condition was impaired under the laws of Maryland and other states; that it could not transact further business until the impairment was made good, and asked that a receiver be appointed to preserve its assets and wind up its business. (Tr. 96). On the same day, the United filed its answer therein admitting the allegations of the bill and consenting to the appointment of receivers. The court appointed as receivers, three of the appellees, Edwin Poe, Stuart S. Janney, and Ernest J. Clark, and these three, together with Mr. Bartlett, who was appointed co-receiver at a subsequent date, have ever since acted as receivers in possession and control of the assets and affairs of the United. (Tr. 97).

The accounting which had been ordered in the case of *Munich Reinsurrance Co.* v. *United Surety Co.* (113 Md. 200), was not completed and finally filed, until January 2, 1913. The bill had been

filed May 29, 1907. The court of first instance (Circuit Court of Baltimore City), entered its decree on October 30, 1909, dismissing the Munich's bill and referring proceedings to an auditor to state an account between the parties as prayed in the cross bill of the United. (Tr. 117). The case was appealed by the Munich, and on May 6, 1910, the Court of Appeals of Maryland affirmed the decree below and remanded the cause for the statement of account provided for therein. (Tr. 117).

Thereafter, on November 19, 1910, the parties, to facilitate matters, entered into a stipulation (Tr. 118-20), wherein the American Audit Company was authorized as agent for both parties, to examine the records, books and accounts of the United, and to state an account in annual periods beginning January 2, 1906 and ending January 1, 1911.

The final audit was filed on January 2, 1913, and all exceptions by either party were overruled by the Circuit Court of Baltimore City and the audit ratified and confirmed. Both parties appealed and the appeals were finally disposed of by the Circuit Court of Appeals on June 26, 1913. (Tr. 120). This opinion is printed in the record. (Tr. 142-157). The decision of the Circuit Court of Appeals affirmed in part and reversed in part the decree of the lower court, making a further audit necessary. This audit was filed on September 26, 1913 and the amount thereby ascertained to be due by the Munich as of January 1, 1911, together with interest thereon to September 30, 1913, in all, $77,445.79, was paid by the Munich to the receivers of the United on October 2, 1913 (Tr. 120).

In June, 1914, the United's receivers filed a petition in the case which had been brought by the Munich in 1907, for a further accounting. In this case final decree had already been entered and the accounting therein provided for, had been accomplished, and satisfied by the payment of the amount found due from the Munich to the United. The Maryland Court, upon the petition for further accounting, held that the issues in the case as originally outlined in the pleading, had been finally determined and the case closed, and that the court was without jurisdiction to entertain the receivers' petition, (See opinion of the court, Tr. 122-133).

On June 11, 1920, appellees filed a claim under Section 9 of the Trading With the Enemy Act, with the Alien Property Custodian, asking that they be paid the amount therein stated, as a further indebtedness of the Munich to the United under the Participation Contract. The claim not being allowed or paid, the present bill was filed on June 12, 1920 in the United States District Court for the District of Maryland.

Specification of Errors.

The errors relied upon on this appeal, are to be found in the Assignments of Error (Tr. 23 et sec.), numbers 1, 2, 3, 4, 5, 6, 7, 8, 10, 12, and 13. The questions involved in these assignments may be summarized as follows:

1. The court erred in not dismissing the bill for the reason that there had been a material breach of the Contract by the United and its receivers, which should bar any recovery against the Munich thereunder.

2. The court erred in its construction of the contract and ordered an accounting upon an erroneous theory under which the Munich is required to pay a large sum of money, for which it should not be held liable.

3. The account as confirmed, includes many items of charge against the Munich as to which the parties are already foreclosed as *res adjudicata* by the account stated by the Maryland courts in the former litigation.

ARGUMENT.

I.

The court erred in not dismissing the bill for the reason that there had been a material breach of the contract by the United and its receivers which should bar any recovery against the Munich thereunder.

Under the terms of the Participation Contract, the United and the Munich were committed to a joint adventure in certain fields of suretyship and insurance. Presumably both parties were familiar with the technical aspects of the business in which they were to engage and understood the contract which had been the subject of lengthy negotiation.

Under our second point it will be necessary to scrutinize the Participation Contract in order to ascertain whether, in construing its provisions, it is to be classed with what are known as reinsurance contracts or treaties, or whether it more closely resembles a joint adventure, in which the parties, without being partners, share jointly in the fortunes of the common enterprise. We need

here consider it only insofar as it reflects the knowledge of the parties of the exigencies of their common business and their mutual intentions as to the future conduct of the joint enterprise in reliance upon which the contract was agreed to.

The business of insurance, including suretyship (although the latter is not strictly insurance), is based upon "averages". Realizing that losses will occur and that each loss claimant will probably receive many times the amount paid for his indemnity, the underwriter, by building up a volume of business, derives an aggregate income from his policyholders, including the many who will suffer no loss, which will enable him to meet those actually incurred, pay his expenses, and earn a reasonable profit. This "dissemination of hazard", as it has been called, spreads in two dimensions. The business in force at any given time (usually referred to as the portfolio), must be carefully placed with a view to holding the contingent liability in the event of loss, to a minimum amount while deriving income from broad spread and numerous policyholders. But it is equally important, from the standpoint of scientific underwriting, that the hazards of the business be spread as to time. Losses of certain kinds occur more frequently at certain times of the year. Other classes of losses become heavy after financial depression. Burglary losses become accentuated in what have come to be referred to as "crime waves". From a recognition of these facts and their results as shown in the operation of the business, come the regulations of the state departments as to the reserves set aside out of paid premiums. Rates also are calculated upon the experience of a period of

years, usually from five to ten, and the surplus maintained by conservative companies over and above all estimated or expected liabilities is proportionate to the size of the portfolio and the unexpired contingent liability under policies in existence.

In the Participation Contract these principles are reflected in several ways. Article 8 (Tr. 17-18), which prescribes the formula to be used in arriving at profits and losses, makes due provision for premium reserves and loss reserves, but the provision directly bearing on the point under discussion, is Article 12. Therein is provided:

> "This agreement shall take effect as of the Second (2nd) day of January, 1906, and shall continue for a period of Five (5) years from said date and shall stand as tacitly renewed for further periods of Five (5) years thereafter unless written notice of a desire to terminate the same be given by registered letter from either party One (1) year previous to the expiration of any term of Five (5) years.
>
> The 'Munich', however, has the right to withdraw after the expiration of the first period of Five (5) years from this agreement, at the end of any calendar year by giving One (1) year's notice in writing if the transactions under this agreement result in a loss to the 'Munich', . . . the 'Munich' continuing to participate in all insurances coming within the terms of this agreement granted or renewed by the 'United' during the currency of any notice of cancelment, and remaining liable for its share of the claims arising out of such insurances and out of insurance in force at the time of the notice being given, until expiration of the liability thereon."

It is to be borne in mind that under this contract the Munich neither had, nor was entitled to assume any part in the management of the business whose profits or losses it was to share in certain proportions. It was the "passive member" in the joint adventure, and the United was to be and remain the active manager of the joint business for the benefit of both companies. As such manager it was, in a sense, the trustee of the Munich in the conduct and management of the joint adventure and owed that Company the duties usually flowing from such relationship.

The terms quoted above under which the Munich should be permitted to retire from participation clearly indicate that both parties recognized that as to the business in force at the time any notice of cancellation took effect, the interests of each were bound with the other and required a continuance of the relationship as to that business until, by natural expiry, the policy obligations should come to an end. The portfolio, at any one time would consist largely in business upon which annual premiums were to be paid by the assured during the life of the surety or insurance obligation. It would be composed of various classes of obligations which, by their terms, would run for indefinite periods, such as appeal bonds, guardians' bonds, administrators' bonds and obligations of that class. There would be also on the books, annual business such as burglary insurance which, under the terms of the contracts, would expire usually a year from the date they took effect. Taking a miscellaneous portfolio of this character, if rates were properly calculated on an adequate basis and the business allowed to run off by expiry and normal cancellation, the

premiums derived during the period of unexpired risk could be expected to take care of the losses and expenses.

It needs no argument, to accentuate the importance to the Munich of this feature of the contract. When the Munich consented to be bound *to expiry* on all existing business for all losses which might occur, it must have been in contemplation of a normal premium income to be derived from the business and applied so far as it would go to the payment of losses and expenses incurred during the period for which it remained bound.

One year prior to December 31, 1910, the Munich served notice of its intention to withdraw from further participation in the business. The notice was served strictly in accordance with the provision of Article 12, quoted above. Under the terms of that article, the withdrawal became effective as of December 31, 1910. The volume of outstanding contingent liability on the books of the United at that time, in the fortunes of which the Munich was, by the terms of the contract, obliged to continue its interest, amounted to $69,268,458.00, and the annual premium income from the business amounted to $345,525.92 (tr. 63). The testimony of Clark, one of the receivers and an insurance man of experience, (Tr. 53), is:

> "If this mass of business which was left in the office (of the Surety Company), by the termination of this contract, had run to normal (sic expiry), with the United Surety Company as a going concern, the premiums from that mass of business would have taken care of losses if those premiums could have been collected."

The business was not permitted to run to expiry.

As appears in the statement of facts, on Jan. 13, 1911 (the notice of cancellation served by the Munich having taken effect on Jan. 1st), and while a stockholders' suit was pending in another court praying for receivers for the corporation upon the ground of its insolvency, a suit was brought in the Circuit Court of Baltimore City in the name of Thomas H. Bowles. The United was the defendant. The bill in this case alleged that the United was solvent but "impaired" under the laws of several of the states in which it was licensed, and had by these states been ordered to take on no new business. The bill prayed that receivers be appointed to take over and liquidate the affairs of the company. The purpose of this second suit is quite clear and needs no comment. The United at once filed its answer admitting the allegations of the bill, consented to the appointment of receivers, and on the same day the court appointed as receivers, Mr. Poe who was the president of the company, Mr. Clark, one of its directors and a member of its executive committee, and Mr. Janney, its general counsel (Tr. 97).

On Feb. 6, 1911 the receivers petitioned the court for leave to instruct agents to pay out of the balances in their hands to the credit of the United, return premiums on bonds tendered for cancellation. An order to this effect was entered the same day (Tr. 97-98).

This was in effect, an invitation to the agents to protect their friends and customers at the expense of the corporation and its general creditors, as, in the case of eventual insolvency, the pro rata return premiums thus paid in full would be, in effect, a preference. The commission granted was, of course, generously used. It appears from the record (Tr. 180-1) that approximately $125,000 (75%

of $167,412.67) of return premiums were paid out. In other words, by these cancellations brought about by the receivers, the Munich was deprived of over $41,000 (⅓ of $125,000) in money collected as premiums and in the possession of the United and its agents when the receivers were appointed.

On April 10, 1911, the receivers again applied to the court; this time, it was for permission to cancel or lapse the annual business (burglary and plate glass insurance and fidelity bonds), at the yearly date of maturity instead of renewing, when possible, and to bring about the termination of risk in long-term business (suretyship), by waiving the right to collect annual or renewal premiums or any part thereof in exchange for releases from the contingent liability assumed under contracts of suretyship. An order to this effect was entered on the same day (Tr. 99-100).

On December 21, 1911, the receivers petitioned the court again. The petition recites the execution by the company, of judicial bonds of every description; reiterates the belief of the receivers in the solvency of the United, and asks the court to order the receivers to furnish the courts where "United" bonds are still in force, a list of such bonds with request that the judge of such court require substitution of other bonds for those of the United. An order to this effect was made the same day (Tr. 100).

On October 10, 1912, an order was made in the receivership case, at the instance of the receivers, terminating all liability of the United upon its outstanding obligations as of January 13, 1913 (Tr. 116).

This last order was thereafter reversed by the Court of Appeals of Maryland upon the ground that the United, upon the record was solvent and

therefore was bound to the performance of its executory contracts (120 Md. 91).

As we have seen, when the receivers were appointed, the volume of existing business aggregated $70,000,000.00 of contingent liability on policies and bonds outstanding, representing an annual income of approximately $345,000.00. At the end of 1912 (a period of two years), the volume of the outstanding contingent liability had shrunk to $9,000,000.00, with an apparent premium of something over $100,000.00 (Tr. 72-73).

The word "apparent" is used in this connection advisedly. The effect of the voluntary receivership; of the order obtained by the receivers to cancel obligations and return premiums; the lapsing or cancelling of the annual business; the request to courts and judges throughout the country to have other bonds substituted for the United Bonds; and the order directing the cancellation of all outstanding contingent obligations, would inevitably bring to an end all business which could be underwritten by other insurance or surety companies, leaving on the books of the United, policies and bonds under which losses had already been incurred or business so undesirable as not to be attractive to other companies and therefore not transferable.

It is to be borne in mind that for several years after the receivers were appointed, it was constantly insisted by them, in and out of court, that the United was and continued to be solvent. At the time the receivers were appointed, and thereafter, imposing figures were presented to the court as representing the assets of the company and as an evidence of the reiterated claim that it was solvent.

At the trial of this case a very different picture was presented. It developed that no dividends had ever been paid to creditors; that although the receivers had liquidated and realized upon the assets of the United as far as could be done, and had received $77,000.00 from the Munich, they had approximately $16,000.00 in bank. The hope is expressed that they may eventually be able to pay 25¢ on the dollar to creditors. (Tr. 77-8).

Under the decisions, it would seem to be immaterial whether a party guilty of an anticipatory breach of an executory contract, be solvent or insolvent. The adverse party is not concerned with the cause of the breach unless some defence such as impossibility of performance as that term is understood in law, can be shown in connection with the breach.

In *Central Trust Co.* v. *Chicago Auditorium* (240 U. S. 581), this court held that the filing of an involuntary petition in bankruptcy against a baggage, transfer and livery corporation, followed by an adjudication of bankruptcy, was the equivalent of an anticipatory breach of its executory contract with a hotel company for handling the latter's baggage and livery business, where the trustee in bankruptcy does not elect to assume performance. In delivering the opinion of the court, Mr. Justice Pitney said (page 590):

> "The contract with which we have to deal was not a contract of personal service simply, but was of such a nature as evidently to require a considerable amount of capital, in the shape of equipment, etc., for its proper performance by the transfer company. The immediate effect of bankruptcy was to strip the company of its assets and thus disable it from performing. • • •

"It is argued that there can be no anticipatory breach of a contract except it result from the voluntary act of one of the parties, and that the filing of an involuntary petition in bankruptcy, with adjudication thereon, is but the act of the law resulting from an adverse proceeding instituted by creditors. This view was taken with respect to the effect of a State proceeding restraining a corporation from the further prosecution of its business or the exercise of its corporate franchises, appointing a Receiver and dissolving the corporation in *People* vs. *Globe Ins. Co.*, 91 N. Y. 174, cited with approval in some of the Federal Court decisions above referred to. In that case it did not appear that the company was the responsible cause of the action of the State so as to make the dissolution its own act; *but, irrespective of this, we cannot accept the reasoning.* (Italics ours.)

"As was stated in *Roehm* vs. *Horst*, 178 U. S. 1, 19: 'The parties to a contract which is wholly executory have a right to the maintenance of the contractual relations up to the time for performance as well as to a performance of the contract when due.' Commercial credits, are, to a large extent, based upon the reasonable expectation that pending contracts of acknowledged validity will be performed in due course; and the same principle that entitles the promisee to continued willingness entitles him to continued ability on the part of the promisor. In short, *it must be deemed an implied term of every contract that the promissor will not permit himself through insolvency or acts of bankruptcy to be disabled from making performance;* and, in this view, bankruptcy proceedings are but the natural and legal consequence of something done or omitted to be done by the bankrupt in violation of his engagement. It is the purpose of the Bankruptcy Act, generally speaking, to permit all creditors to share in

> the distribution of the assets of the bankrupt, and to leave the honest debtor thereafter free from liability upon previous obligations. *Williams* v. *United States Fidelity Co.*, 236 U. S. 549, 554, 59 L. d. 713, 716, 35 Sup. Ct. Rep. 289. Executory agreements play so important a part in the commercial world that it would lead to most unfortunate results if, by interpreting the act in a narrow sense, persons entitled to performance of such agreements on the part of bankrupts were excluded from participation in bankrupt estates, while the bankrupts themselves, as a necessary corollary were left still subject to action for non-performance in the future, although without the property or credit often necessary to enable them to perform. We conclude that proceedings, whether voluntary or involuntary, resulting in an adjudication of bankruptcy, are the equivalent of an anticipatory breach of an executory agreement within the doctrine of *Roehm* v. *Horst*, *supra.*"

The District Judge who heard the case at bar in the first instance, avoids the application of the declared principles of the Auditorium case in the following language (Tr. 170):

> "By the election of the Munich, the contract ended on January 1, 1911, except for the settlement by one or the other, of the obligations already incurred. Thereafter the Munich had no interest in any new insurance which the United might write. It had no right to require that the United should continue in the business in which it had of its own free will declined to have lot or part. After the expiration of the notice of termination, the United was free to decide for itself whether it would go on, and the Munich had no right to complain that the decision was in the negative. When such a concern ceases

to do new business, it must either in one form or another reinsure its outstanding risks or do what it can to terminate, so soon as may be, its liability upon them. To keep up its complete organization, for the mere purpose of handling insurance already written and such renewals as might be brought about, would be ruinous and no such contract as this between insurance companies can reasonably be interpreted as binding either of the parties to such waste of money. The United tried to reinsure, but so far from being able to do so, it could not find anybody willing to assume its liabilities in exchange for its assets. That is, in the judgment of the other companies who had (238), at its instance, examined its books with a view of taking over its business, it had already incurred obligations which would seemingly entail a loss upon its exceeding the amount of its capital. For a third of the larger part of these losses, the Munich would be liable. In that state of things, all that the Munich could justly require was that the United should, in good faith, exercise reasonable care to wind up its business to the best advantage, and that, so far as the record discloses, is precisely what the receivers did.

"The Munich was to pay one-half of the net liability retained by the United. There was no limitation as to the amount for which it might become bound. When the contract was made, it was quite possible that the obligations which in five years the United might assume, would ultimately entail a liability exceeding its capital and surplus. In that event, it would have to close its doors and liquidate its business, and if it did, according to the Munich's present contention, the latter would be discharged, that is to say, if the United's losses were very great, the Munich would be released from obligation to pay any of them. Such a claim is its own best answer. It is

> therefore unnecessary to decide whether, as the United asserts, the Munich has estopped itself from setting up a defense which has, on other grounds been held bad. The litigation between the two companies continued for years after the United went into receiver's hands, and after the latter had done all in their power to bring about a cancellation of the outstanding risks. Never, until the institution of these proceedings, did the Munich raise the point upon which it now seeks to rely. It allowed all the other courts to assume that it did not dispute its obligation to account at the proper time and in (239) the appropriate proceeding. If for the purposes of this case it be assumed that all this did not work a technical estoppel, it at least shows that the present defense had not then suggested itself to the ingenuity of any of the able, astute and experienced counsel who appeared for the Munich. It is difficult to resist the conclusion that it would not so long have escaped their attention had there been anything of substance in it."

As to the last part of the quotation, a sufficient answer is, that in this case for the first time in all the litigation between these parties, does the question of the effect of the receivers' acts in destroying the existing business of the United, upon the rights of the parties, become relevant. The former litigation involved the accounting for the first five-year period *only*. The acts of the receivers thereafter could have no bearing, and therefore no place in the discussion. In this case these facts are pertinent for the first time, and the question was raised in the initial forum. The appellants are therefore entitled to have it considered not as a last resort of some hair-splitting lawyer, but as an argument seriously made and entitled to due consideration.

As to the question of waiver or estoppel upon the Munich because it sought first to rescind and afterwards cancelled its contract with the United in accordance with its terms, and which the court below does not undertake to decide, it would be difficult to uphold the validity upon such a contention. An unsuccessful attempt to rescind a contract on the ground of fraud could not well be construed as leaving the other party in a position to thereafter observe the provisions of the contract or not as he saw fit. As to the cancellation, when the underlying instrument in precise terms provides for cancellation at the end of any five-year period and in terms equally precise binds both parties, in the event of cancellation, to continue their responsibilities as to the then existing business to its normal expiration, it can hardly be seriously contended that the exercise of the privilege of cancellation has the effect of nullifying the requirement that the business be continued to expiry.

The position taken by the lower court that, after the expiration of notice of termination the United was free to decide for itself whether it would go on and the Munich had no right to complain that the decision was in the negative, followed by the argumentative statement that unless the United could reinsure the existing portfolio which it tried and failed to do it would have been foolish to continue its organization merely for the purpose of running off the business then on its books, is, we submit, an invasion of the rights of the parties to make and enforce their own contracts. The terms of the contract are specific (Art. 12, pp. 19-20). In providing for a joint participation in this business "until expiration

of the liability thereon", the word "expiration" is to be construed in the insurance sense as contrasted with termination of liability by cancellation. The purpose of the parties is further evidenced by Article 13, in which careful provision is made for rendering accounts with respect to the business being run off and carrying proper reserves for outstanding claims. Many defendants have been heard in courts to plead inability to carry out the terms of a contract made by them, either by reason of lack of funds, change in circumstances, or other plausible pretext. As early as *Thornborow* v. *Whitaker* (2 Ld. Raym. 1164, 1705), the English courts told an unfortunate defendant who found that under a contract he had entered into with considerable lack of foresight, he was called upon to pay to the other party more rye than was grown in a year in all England, that that was a misfortune, probably not his fault, but was no answer to the demands of his adversary. Such defenses have rarely been successful in court. In the case at bar, however, we have the plaintiffs asking for, and in the lower courts obtaining, affirmative relief against the defendant in the face of an anticipatory breach of the contract on their part, the effect of which was to destroy the safeguards which the defendant had reared by the provisions of the contract, against the probability of its having to pay the large sum now demanded of it.

If the reasoning of the court below is sound, it would seem that in *Central Trust Co.* v. *Chicago Auditorium,* the liability of the bankrupt estate could have been avoided by a showing on the part of the receiver in Bankruptcy that he had tried to get someone else to take over the contract, without success, and that it would have been

inconvenient, impractical, and an undue burden on the estate to continue its organization and operation to carry out a single contract.

II.

The court erred in its construction of the contract and ordered an accounting upon an erroneous theory under which the Munich is required to pay a large sum of money for which it should not be held liable.

In his opinion the learned judge in the District Court erroneously, as we think, referred to the contract as one of "reinsurance".

Reinsurance has a definite meaning in law and the rights and obligations of parties to such a contract have been formulated and enforced by our courts for more than a century. The legal conception of the relations between a reinsurer and its reinsured has been so far crystallized, that this Court, in one case, refused to allow the parties themselves, by the language of the agreement, to vary the recognized legal effect of such contracts. (*Allemania Fire Ins. Co. v. Firemen's Ins. Co.,* 209 U. S. 326.)

If the so-called Participation Contract is to be construed as an agreement for reinsurance, then two things follow: First: the reinsurer is to be credited for earned premiums on reinsurances effected thereunder, whether the reinsured company succeeds in collecting its own premiums from its policyholders or not, and, Secondly, the reinsurer owes to the reinsured company its proportionate amount of the losses occurring under the latter's

policies without regard to the actual payments received by the policyholders from the direct writing company.

If, on the other hand, as we contend, this contract embodies a joint adventure and not a reinsurance, the results are the reverse. The Munich, sharing in the fortunes of the United, can only claim credit in its settlements with that company, for its proportion of the premiums actually collected by the United from its policyholders, and in turn should bear only its share of the losses actually paid by that company.

The relief granted in the courts below is consistent with neither theory. The Munich is confined to a credit of premiums on the basis of actual collections by the United from its policyholders, but is required to pay its full share of the losses *incurred* by the United although it is admitted that these losses have never been paid and that only a small percentage of them will be realized by loss claimants, even if the full amount prayed for is collected from the Munich.

(a) *On the theory of reinsurance the Munich is entitled to a credit for all earned premiums without regard to the collections by the United from its policyholders.*

A number of the definitions of reinsurance to be found in the text books and reports are collected in I Joyce on Insurance, §112 (2nd Ed. p. 342). The one taken from Phillips (1 Phillips on Insurance, 3rd Ed., 209) is typical, and reads as follows:

> "A contract whereby one party called 'the reinsurer', in consideration of the premiums paid to him, agrees to indemnify the other

against the risk assumed by the latter by a policy in favor of the third party."

For many years the practice of underwriters was to effect separate reinsurances with respect to specific policy liabilities. This entailed the trouble and expense of negotiating and making one or more contracts with other Companies for each policy written to cover a greater liability than they were willing to assume, and in recent days, when property owners and businessmen demand a limited number of large policies in place of a multitude of small ones, the custom has grown up of entering into running contracts for reinsurances (ordinarily called treaties), under which reinsurances of policy obligations are effected more or less automatically by means of bordereaux or notices, of the issue of policies by the reinsured company, sent to the reinsurer.

Whether effected specifically in each case or by treaty, the elements of the contract remain the same. The premium paid is usually a proportionate part of the original premium charged by the Reinsurance Company, less deduction allowed as representing the acquisition cost of the business to the reinsured company. This acquisition cost to the direct writing company includes agents' commission, brokerage, local licenses and taxes.

There is no privity between the reinsurer and the third person whose property is the subject-matter of insurance. It is not the interest of this person in the property which is insured, but the interest of the Company which issued the original policy, the Courts holding the fact that the original insurer has assumed a risk to give such insurer an insurable interest in the subject-matter

of its insurance, and prevents reinsurance taken out by it from being a wager contract.

> *New York Bowery Insurance Company* v. *Insurance Company,* 17 Wend. (N. Y.) 359;
> *Philadelphia Insurance Company* v. *Insurance Company,* 23 Pa. St. 250;
> *1 Phillips on Insurance,* §375 (3rd Ed.).

Because the interest insured is not that of the owner but of the first insurer, the contract is not within the statute of frauds.

> *Bartlett* vs. *Firemen's Fund Insurance Company,* 77 Iowa 155;
> *1 Joyce on Insurance,* 2nd Ed., § 116, p. 352.

It has also been held that the term "reinsurance" is not indispensable, but that an ordinary policy of insurance may be issued by one underwriter to another. It is reinsurance in fact, whatever it may be called, if the interest insured originates in the issue of insurance coverage by the insured to someone else.

> *Home* v. *Mutual etc. Insurance Company,* 3 N. Y. Super. Ct. 137-151.

Moreover, the Courts hold that contracts of reinsurance when sued on are open to all defenses of an independent contract, regardless of the underlying contract with the third person.

> *Sun Mutual* vs. *Ocean Insurance Company,* 107 U. S. 485.

Taking the proper conception of reinsurance to be a distinct, independent contract whereby one underwriter indemnifies another against all or a certain portion of the liability assumed by the latter in a policy issued to a third person, certain results are at once apparent:—

The subject of insurance being *liability under a contract*, and not loss or damage to property, the reinsurer must pay the whole amount of his obligation to the reinsured, whether or not the latter pays anything to his policyholder, and is entitled to receive his premium without regard to collection by the reinsurer from the original policyholder.

(b) *If this be a joint adventure, then under the language of the contract the United can only call for settlement by the Munich upon the basis of losses actually paid by it.*

We have, from the inception of this suit, urged that this is not reinsurance, but a joint adventure, or as the Maryland court has called this particular contract, a "Participation Agreement", (Opn. in *Poe* v. *Receivers*, 121 Md. 479, See Tr. 149), whereby one company agrees to share in the losses or profits accruing with respect to certain lines of business transacted by the latter, the sharing to be in certain proportions based upon annual statements to be rendered by the company transacting and managing the business, to the other. The charges and credits to be used in determining loss or gain are specifically prescribed in the instrument itself.

While there is a so-called "ceding" of a certain proportion of each policy mentioned in Article 1 of the contract, the evident purpose of that article

is to prevent the United, in the annual accounting, from charging the Munich with more than its share of losses or *net* retentions of the United. There is nothing in the contract providing for the payment of premiums to the Munich and no consideration which would support an independent contract of reinsurance.

The Munich in effect has by this agreement said to the United: We will take a one-third interest in certain lines of your business; we will let you have the sole management of it; issue your applications in prescribed form; collect your premiums; pay your agents and brokers whatever you see fit, and settle your losses. At the end of the year you shall account to us and include in your account, the proper proportion of your overhead prorated between the lines of business in which we have this one-third interest and your other lines in which we have no interest. If this account shows a profit to you, we take a third; if it shows a loss, we pay a third.

There is no partnership here because the idea of mutual agency, inseparable from a partnership, is absent. One party takes entire control of the business, and the rights and obligations of the other are to pocket his share of the profits or pay his share of the losses, as the case may be. When you take into consideration that this contract was coupled at its inception with a large subscription by the Munich for stock in the United, the transaction as a whole comes close to "grub staking", so usual in the days of mineral prospecting. Whatever it may be—a participating arrangement, a joint venture, or a backing of one Insurance Company by another for a chance to share in the profits that may accrue, it is certainly not a *reinsurance contract.*

If we look at the contract itself to determine the extent of liability thereunder, unhampered by any preconceived legal measure of liability which attaches to a reinsurance contract, our way is fairly clear.

Article VII (Tr. 17) provides for the profit and loss account to be rendered at the end of each year by the United to Munich on which profits and losses is in Item 3 of the disbursements "Claims *paid,* less salvage and reinsurance in other Companies."

In Article XIII (Tr. 20), it is provided that in the event of termination of the contract:

> "In case of notice of termination by either party the accounts shall be made up not later than two years after the expiration of the notice. Such accounts shall not be charged with any premium reserve. If claims are still outstanding the proper reserve shall be charged and *after final settlement* of each of such claims the Munich will be paid any difference in its favor and pay any difference in favor of the United."

This again looks to *ultimate* payment—a *final settlement* of outstanding losses as the only basis on which the Munich is to be bound. If any doubt arises that "settlement" here may mean the determination of the amount of an insurance obligation, ordinarily called by insurance men "an adjustment", and if the word "final" is urged to be superfluous, the parties here in another clause of the contract, have clearly indicated what they mean by "settlement". Article VI (Tr. 13) provides, "The Munich shall also be advised of all claims *settled,* by monthly lists showing *payment* to the assured and cost of settlement as per annexed form."

In passing upon this point, the Court below says, (Tr. 171):

> "It (Munich) argues that final 'settlement' here means payment. So to hold would run counter to the whole scheme of the agreement between the Companies. What the Munich assumed was one-third of the liability. . . The words 'final settlement' as used in this contract must be held to mean the fixing by agreement or judicial determination of the amount due by the United on the bonds or policies for which the Munich assumed a one-third liability."

With all due respect, the Court itself has run counter to the whole scheme of the agreement between the parties. There is not a line in the contract whereby the Munich is required to pay a third or any other part of the liability of the United on any specific bond or other obligation. The only payment it is required to make is its proportion of the loss resulting from each year's operation,—after taking into account numerous overhead expenses, items such as taxes, office rent, advertising, printing, etc., etc., and by the terms of the contract this loss is to be calculated, not upon the liability of the United under its bonds and outstanding obligations but upon "*Claims paid*, less salvage and reinsurance in other Companies." Since none of the claims against the United which form the basis of the accounting herein have been paid, the judgment and decree of the Court below should be reversed and the bill ordered dismissed as prematurely brought.

III.

The account as confirmed, included many items of charge against the Munich as to which the parties are already foreclosed as res adjudicata, by the account stated by the Maryland courts in the former litigation.

The Participation Contract provided that accountings and settlements were to be made for each year's business. An accounting for the first year (1906), of the contract term was ordered by the Maryland court in the case instituted by the Munich for a recission of the contract wherein the United had, by cross bill, demanded an accounting for this first year which had ended shortly before the suit was brought. The lower court dismissed the Munich's bill but entertained the cross bill of the United and ordered an accounting for this first year. The case went to the Maryland Court of Appeals, where it was not decided until May 6, 1910 (Tr. 117). The lower court was affirmed.

On November 19, 1910 the parties, their rights having been determined, and the status of the contract between them as to the first five-year period having been settled as a result of the decree, entered into a stipulation (Tr. 118-119) whereby the order of the first year's accounting is enlarged to embrace each year for the first five-year period. This stipulation in part reads:

> "First: The said Munich Re-Insurance Company and the said United Surety Company do hereby constitute and appoint the American Audit Company their agent to examine the records, books and accounts of the

United Surety Company and therefrom to state an account in annual periods beginning 2nd January, 1906, and ending on January 1st, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company as per their contract above referred to.

"Second: The Munich Re-Insurance Company and the United Surety Company will each delegate one of their employees to assist in such accounting and all amounts passed by the American Audit Company and to which no objection has been raised by either of the delegates, shall be deemed to be accepted by both parties, and the fact and amount of any item of receipt or disbursement by said Surety Company as found by said Audit Company shall likewise be conclusive upon the parties hereto, the facts and circumstances surrounding such item (unless agreed to) and the relevancy thereof to the accounting between the two companies being alone left open for future determination. The audit, however, shall not extend to outstanding liabilities for unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract."

In due time the American Audit Company accomplished its work and submitted its report, and the parties then proceeded with the accounting before the court auditor to whom the case had been referred in the suit then pending between them.

The court auditor did not complete his work and submit his report to the court, until January 2, 1913. At a hearing then had on Motion to Confirm, all exceptions filed by both sides to the auditor's report were overruled and the report confirmed. Both parties appealed. On June 26, 1913

the Maryland Court of Appeals reversed in part and affirmed in part the decree of the court below confirming the account as stated, and remanded the case upon order to re-state the account between the parties to conform to its decision (Tr. 120).

The account was re-stated and ratified by the court in September, 1913 and the balance found to be due from the Munich ($77,445.79), was paid to the receivers of the United on October 2, 1913.

It is to be borne in mind that the Munich, prior to this, and in the latter part of 1909, had availed itself of its right under the contract, and served notice upon the United of its intention to terminate the contract as of December 31, 1910. The five-year period covered by the audit as provided for in the stipulation between the parties therefore covered the entire period as to which, under the contract, the parties had a participation in the entire volume of business transacted in given lines by the United.

The wording of the stipulation of November 19, 1910 clearly indicates that the accounting then to be had was intended to cover all questions between the parties as to the business of the five-year contract period, leaving open "outstanding liabilities for unexpired risks or claims not yet settled". The language of the stipulation, "both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract", clearly indicates a deliberate intention that everything between them is to be settled except the matters expressly reserved.

In the account as finally stated in the state court case (Tr. 157-165), the joint business for

the five-year period is credited with the gross premiums of $454,844.42 (Tr. 161). In the account as confirmed by the courts below in this case there appeared a credit of $167,421.67 as "return premiums and rebates" which had been allowed since January 1, 1911. In the stipulation of facts herein it is agreed (Tr. 180), that 75% of this item represents return premiums allowed on bonds on which premiums were charged *prior to January 1, 1911 and credit therefor given in the account ratified in the state court.* In other words, in the present accounting the receivers have been permitted to open the account stated between the parties in the state court in 1913, and to charge back against the Munich about $125,000.00 of premiums as having been returned by the United which, in the first accounting between the parties had been created to the business as an asset in connection therewith in arriving at the balance due from the Munich.

From the stipulation between the parties entered into for the purposes of facilitating the accounting in the court below (Tr. 178-183), it appears that a part of this $125,000.00 represents premiums actually returned by the receivers in the cancelment of the Company's obligations; that as to the remainder, the defendants below denied that it consisted of "return premiums and rebates", as that term was used in the contract. This contention was based upon the undisputed fact that premiums which had been credited up as assets, but which afterwards proved uncollectible, had been charged off as "return premiums."

With the propriety of this we are not at present concerned. The question here, is whether

either party, in the absence of fraud or mistake, can open an account stated for the purpose of charging the other with items for which he received a credit in the stated account. There is no question of mistake or fraud as the actual return premiums were made with full knowledge of the facts, and the so-called return premiums which had in fact never been collected and were judged to be uncollectible, are merely bookkeeper's entries.

To arrive at the rights of the parties it will be necessary to review at some length the decision of the Court of Appeals in Maryland under which the original account was stated.

In the audit approved by the lower Court of Maryland there was an item of "Premium reserve for unexpired risks $185,698.88" under the head of disbursements. The Munich sought to eliminate this item and the Court of Appeals did eliminate it. In its opinion the Maryland Court said: (Tr. 149).

> "The question as to the extent to which the premium and claim reserves should be considered in the accounting requires a reference to the relations of the contracting companies to each other at the time of the preparation of the audit. So far as the annual accounts mentioned in Article VIII of the participation agreement are concerned it is distinctly provided that both classes of reserves shall be included. But there is an equally express provision in Article XIII that if notice of termination is given by either party, the account to be stated (212) after the expiration of the notice shall not be charged with any premium reserves. The privilege of withdrawal was secured to the parties by Article XII, as above quoted, and was exercised by the Munich Company in the manner prescribed, with the

result that the contract ceased to be operative, except as to business already subject to its terms, when the original five year period expired on January 2nd, 1911. The auditor's account was prepared in December 1912, nearly two years after the withdrawal of the Munich Company from the agreement. In consequence of the litigation between the parties no settlement ever occurred as to any part of the business to which the contract applied. The present accounting must accordingly include the annual ascertainment of profit and loss required to be made during the currency of the contract *and also the settlement for which it provides after the expiration of the notice of withdrawal.* The audit as filed is composed of five annual statements in each of which both premium and claim reserves are charged as disbursements. The statement for the final year of the contract will illustrate the method and theory of the accounting for all of the annual periods."

* * * * * * *

(Tr. 151).

"It is explained by the testimony that the premium reserves for unexpired risks represent a portion of the annual premiums set apart as unearned until the expiration of the year for which they are paid in advance. At the end of the term for which the premiums are received the reserve is released and becomes available as current income. A new reserve is then created out of the premiums paid for the succeeding period. In the annual accounting for which the agreement provided the gross premiums were to be included in the income, and the proper deduction of the unearned portion was to be accomplished by charging premium reserves among the disbursements. The next accounting, however, would give the parties the benefit of the fund

thus reserved by treating it as income under the description of 'Reserve for Unexpired Risks at the end of the previous year.' The same disposition was to be made with respect to the reserve for claims, which, as the designation suggests was composed of amounts estimated for actual but unsettled losses. This reserve was intended to meet a real though unascertained liability to which both parties to the contract were subject in the proportions specified, while the premium reserve had no such purpose, but was provided merely as a suspension to that extent of the (215) right of the Surety Company to use the premiums as ordinary income until the expiration of the full period for which they were received.

"In charging the reserves of both classes as disbursements in the annual accounts for the four years prior to the notice of withdrawal the audit is in conformity with the express provisions of Article VIII to that effect. *But in the accounting for the business of the last year under the contract we think the terms of Article XIII are clearly applicable.* The notice of withdrawal to which that article refers having been duly given, it is directed that the account be made up not later than two years after the contract has been thus terminated and that no premium reserve be charged. If the previous accounting contemplated by the agreement had been effected by the parties, the only business left open for adjustment when the contract expired would have been that which pertained to the final year. It could not have been intended that as to this period there should be two accounts, one prepared under Article VIII including premium reserves as disbursements, and a later one under Article XIII from which such a charge should be excluded. The primary purpose of the annual statements was to show the profits or losses which the parties were to

share. While the contract was in current operation there was no prejudice to either party in charging the premium reserves as disbursements for the reason that these items would be credited as income in the (216) account for the succeeding period. But when the agreement is no longer in effect and the accounting deals with the last year to which it can apply, the conditions are altogether different. The premium reserve could not in such a situation be used as a factor in determining the actual profit or loss upon which the settlement for that year depends because such a reserve as provided under this agreement, represents in fact neither a liability nor an expenditure. It was manifestly upon this theory that the contract excluded the premium reserve from the accounting to be stated after its expiration, and in order that credit might not be given for premiums which were not fully earned it provided for an extension of the time for the accounting until this item could properly be treated as income. In our judgment, the audit, which, as previously noted, was filed near the close of the two year period allowed for making up the account of the business for the last year, and at a time when the premiums received for that year were fully earned, should not have charged as disbursements the premium reserve estimated as of January 1, 1911, and the exception which questioned the propriety of such a charge should have been sustained."

* * * * * * *

(Tr. 153).

"By the terms of the contract the Munich Company's shares of losses or profits were payable promptly upon their annual ascertainment, and if they had been so paid, it is clear that there would have been no occasion to reopen the accounts thus settled, except as the claim reserves for the final year under the special provision for that purpose.

"The United Company is entitled unconditionally to the amounts found to be due it for the four years prior to the notice of withdrawal, as evidently intended by Articles VIII and IX of the contract, and the results thus determined are not dependent upon the accounting for the last year of the business, which is placed upon a (219) separate and distinct basis by the provisions of Article XIII. From the account for this final period the item of $185,698.88 as a premium reserve for unexpired risks should be eliminated. The trust created by the decree passed by the Court below would eventually accomplish this object, but we see no reason to require the Munich Company to pay out, even for a limited period, a proportionate part of the large sum just mentioned, when it is certain that the premiums for which the reserve was originally provided have long since become fully earned. The charge for claim reserves should be retained in the accounting, as contemplated by Article XIII. With the premium reserve excluded from the disbursements the account for the fifth year would show a loss of $30,247.48. One-third of this amount will be payable by the Munich Company to the receivers of the United Company as an ascertained liability, *the parties remaining accountable with respect to outstanding claims as provided by the agreement.*" (Italics ours.)

In order to further emphasize the fact that all question of premiums between the parties was settled by this decision, attention is called to the item of "reimbursement for good will".

Article XIII of the contract provides that:

"It is especially agreed that in case notice of termination is given by either party under this Agreement the 'Munich' shall receive as reimbursement for good will five per cent.

(5%) of its share of the net premiums, i. e., premiums less cancelments, of the last five years previous to the expiration of the notice of termination of this Agreement."

In the same opinion quoted above (Tr. 156) the Court upon this point said:

> "It is our conclusion, therefore, that the Munich Company should be credited with five per cent. of its share (one-third) of the net premiums received from the specified classes of business during the period of agreement."

It will be seen, therefore, that at the time of this accounting the Munich was given credit as "Reimbursement for Good will" one-third of five per cent. (5%) of the premiums for the five years. If, at this time, this account is to be re-opened and a deduction made for premiums received during those five years, it would effect this item of "Reimbursement for Good will" also, which, certainly, was not intended. This is a further illustration of the fact that the account had been entirely closed except as to contingent liabilities on outstanding bonds.

The conclusion of the Court is as follows (Tr. 157):

> "The accounting in this case does not affect the ultimate liability of the Munich Company with respect to obligations issued by the United Company and covered by the participation agreement, as to which defaults are not now but may be hereafter, disclosed. For the protection of potential claims of this nature, as between the United Company and the holders of its bonds and policies, provision has been made in the form of a premium reserve directed in the proceeding reviewed by this Court in United States *vs.* Poe *et al.*, Re-

ceivers of the United Surety Company, 120 Md. 89. This premium reserve there provided, and whose function is clearly and thoroughly discussed in the opinion by Judge Stockbridge, rests (224) upon a different basis from the bookkeeping charge bearing that designation which is stipulated in the contract with the Munich Company as one of the factors in the annual ascertainment of its share of the losses or profits. This item is excluded from the accounting as to the last year of the agreement because there is an express provision to that effect in recognition of the fact that such a reserve is not justly pertinent to the determination of the actual results of the business and of the amount properly payable by one contracting party to the other for the final period. The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement."

In disposing of this point, the court below said (Tr. 188):

> "The next exception is to the allowance for return premiums in respect to business prior to January 1, 1911. This exception is on the theory that an allowance of this sum should have been included, if it was not, in the decree of the Circuit Court of Baltimore City heretofore mentioned and all claims on account of it are consequently *res adjudicata*. As a matter of fact, none of these premiums, as I understand it, were returned or allowed for until after the period of account covered by the decree in question. Exceptions therefore cannot be sustained."

It is not entirely clear whether the court, in this disposition of the question, fully understood the

situation. The point made, was that every controversy between the parties had been settled by the decree in the Court of Appeals of Maryland except the Munich's proportionate share of losses which might eventually develop from the insurance covered by the agreement. That this was the intention of the parties appears from the stipulation of November 19, 1910 (Tr. 118), and was the understanding of the Maryland court as appears from its decision quoted above. Moreover, the same court, when petitioned for a further accounting in the same case (126 Md. 520, Tr. 129), again stated its position and reiterated its former decision:

> "It, therefore, followed that when the audit was stated in December 1912, the premium reserve for 1910 was released and the net premiums on which the five per cent for goodwill was to be allowed were known. Consequently, when the account for the last year (1910) was stated, it was proper to have the settlement for which the contract provided, and that was done. In other words, as the parties had by their agreement of November 19, 191 agreed that the settlement should be made for the five-year period according to the contract, and as the contract excluded the premium reserve from the last year and provided for the five per cent. for goodwill being allowed the Munich, a proper accounting for that year necessarily included the settlement provided for after the expiration of the notice."

Again, in the same opinion (Tr. 133):

> "The only items left open after the decision in 121 Md. are the reserve for claims and the ultimate liability of the Munich Company with respect to obligations issued by the

United Company, which were covered by the participation agreement, 'as to which defaults are not now, but may be hereafter disclosed.' "

It is submitted that in the former litigation between the parties it was held that the final account (to be made up not later than two years after the expiration of the notice (of cancellation)), was had, and is conclusive upon both parties as *res adjudicata;* that the only open item in an accounting between the parties, are the claims outstanding when the first accounting was had, as to which, in the langauge of the contract itself (Art. XIII, Tr. 20), "after the final settlement of each of such claims, the 'Munich' will be paid any difference in its favor and pay any difference in favor of the United."

The decision of the Circuit Court of Appeals of the Fourth Circuit, affirming the decree of the District Court should be reversed.

Respectfully submitted,

DANIEL O. HASTINGS,
Solicitor for Alien Property Custodian.

HARTWELL CABELL,
Solicitor for Munich Reinsurance Company.

In the

Supreme Court of the United States

October Term, [redacted] 1975

No. [redacted] 84

THOMAS W. MILLER, Acting Receiver, Overseas and
MUNICH REINSURANCE COMPANY,
Appellants,

vs.

ERWIN W. POE, STUART S. JANNEY, ERNEST J.
OLSEN and G. KEMP BARTLETT, Executors of
the Estate of Ernest Janney, Deceased,
Appellees.

BRIEF FOR APPELLEES.

JOSEPH C. FRANCE,
G. KEMP BARTLETT,
STUART S. JANNEY,
Solicitors for Appellees.

Of counsel:
BARTLETT, POE & SHAGGETY,
JANNEY, OBER, SHINGLUFF & WILLIAMS.

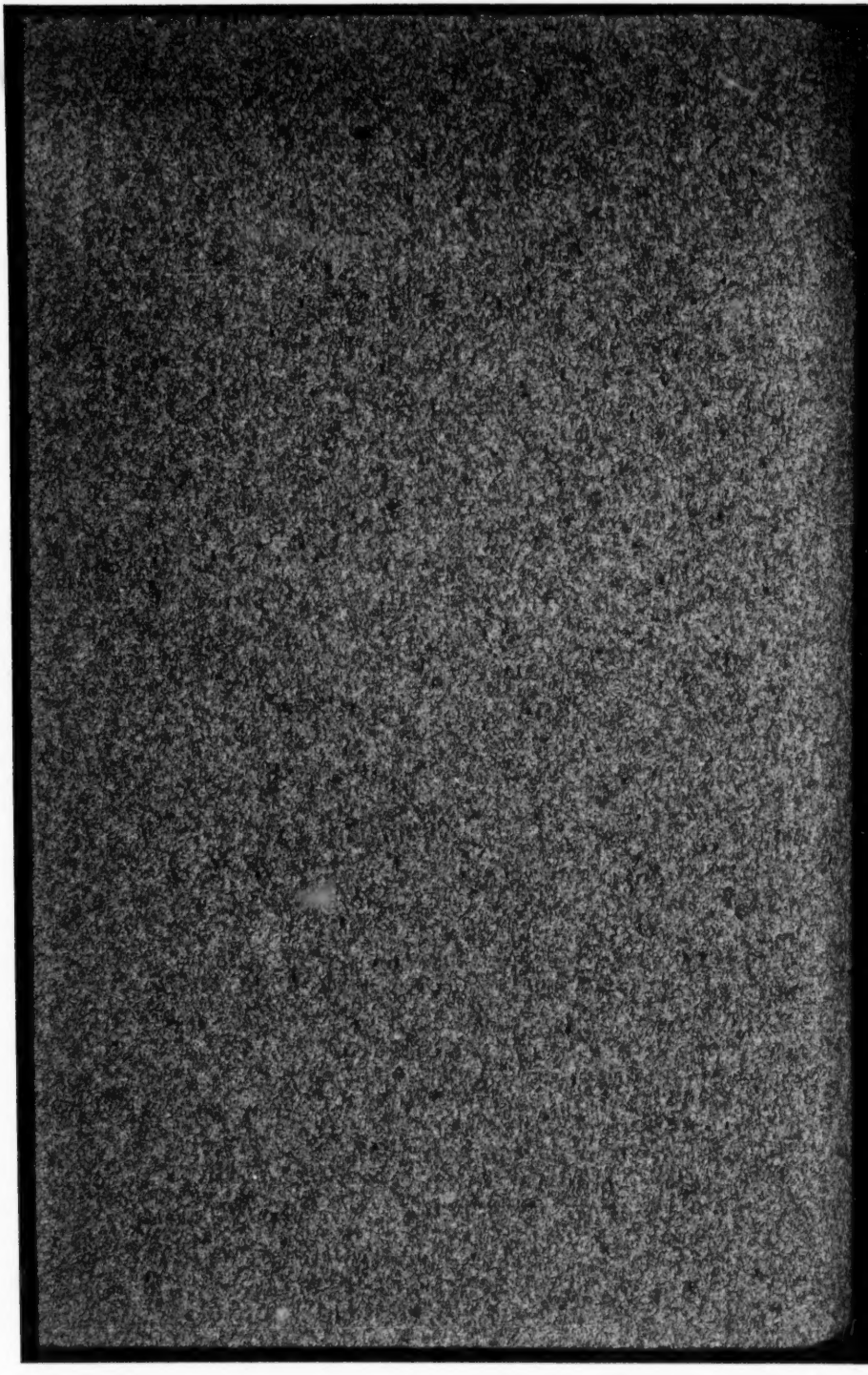

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TABLE OF CASES.

In The

Supreme Court of the United States.

October Term, 1924.

No. 289.

THOMAS W. MILLER, Alien Property Custodian and MUNICH REINSURANCE COMPANY
Appellants

vs.

EDWIN W. POE, STUART S. JANNEY, ERNEST J. CLARK and J. KEMP BARTLETT Receivers of the United Surety Company
Appellees.

BRIEF FOR APPELLEES.

This appeal is from a decree of the Circuit Court of Appeals for the Fourth Circuit affirming a decree of the Maryland District Court in Equity, directing the Alien Property Custodian to pay to the Appellees the sum of $189,517.16 with interest, out of the assets of the Munich Re-Insurance Company,—a German corporation. The Appellees are the receivers of a Maryland corporation, namely: the

United Surety Company; and the suit was brought under Section 9 of the Trading with the Enemy Act, for the final accounting under the Contract between the two Companies,—hereinafter discussed. In the language of Judge Rose, then District Judge (R. 166): "The principal defendant is the Munich Re-Insurance Company, a corporation of Bavaria. The Alien Property Custodian, who holds its American property does not raise any defense peculiar to himself, and may in this discussion be ignored."

OUTLINE OF FACTS.

First: The litigants will be called, for short, the "United" and the "Munich." Their connection began in 1906 with the birth of the United; and is evidenced by the Contract set forth on pages 14-20 of the Record,—which is the basis of this suit. There was much instructive discourse below by the Munich's learned counsel, touching the legal differences between this Contract and the conventional treaty of re-insurance; and these differences seemed to shift with the exigencies of the defense. But, it is respectfully submitted, the decision in this case does not depend upon names. Essentially, the Munich, in consideration of one-third of the profits, agreed to assume and pay to the United, one-third of the losses arising from all business of certain kinds (Fidelity, Surety and Burglary) which should be written by the new Company. As to this business, there was a *quasi* partnership with the United as managing partner; and at the same time, as to one-third of its risks, the United was, in every practical sense, re-insured. Article 1 of the agreement expressly defines the liability of the Munich in the following language:

> "It being understood that the *liability* assumed by the Munich shall be one-half (½) of the *liability* retained

by the United for its own account in each and every case." (Italics ours.) (R. 14 and 15.)

Second: The Contract was for a term of five years from January 2, 1906, with automatic renewals for like terms "unless written notice of a desire to terminate the same be given by registered letter from either party one year previous to the expiration of any term of five years" (R. 19). The Munich, however, reserved the right to terminate, on notice, during any term after the first "if the transactions under this Agreement result in a loss of the "Munich" (R. 19). Forms were provided for the annual accountings; and due provision was made for a final accounting and settlement within two years after termination. This was necessary, because the annual accountings were subject to revision for the reasons hereinafter shown.

Third: The Munich repudiated the Contract (wrongfully, as was decided) at the end of 1906,—which was the first year of the term; and the circumstances were these:

A: The United was to have a paid-in capital of five hundred thousand dollars; and a surplus of two hundred and fifty thousand dollars; and the Munich was to take stock to the amount of fifty thousand dollars,—if and when the balance of the authorized capital and surplus had been taken.

B: The first president of the United was something of a promoter; and he undoubtedly misrepresented, both to the Munich and to his fellow-directors, the character of his subscription list. This misrepresentation was discovered by some of the United's directors, who notified the New York representatives of the Munich, and called a meeting of all concerned. This meeting was held in Baltimore on the evening of Saturday, August 25, 1906. The Munich's representatives stated their grievance, namely: that approximately three hundred and fifty thousand dollars of the stock subscriptions were either contingent or were made by persons of doubtful financial strength. It so happened that among the

directors and stockholders of the United were men of standing. They said to the representatives of the Munich: Your Company (and we) have been fooled; but we believe that with the Munich's backing, the United will succeed. We will change the management of the Company; give the Munich representation on the Board, and we will increase our subscriptions to the extent of three hundred and fifty thousand dollars and pay this amount into the Company in cash on Monday next:—ALL PROVIDED THAT THE MUNICH WILL RATIFY ITS SUBSCRIPTIONS AND CONTRACT. The Munich representatives agreed; and what was promised on behalf of the United,—was duly performed. All of which appears in the Opinion of the Court of Appeals of Maryland in the case of the *Munich Company vs. United Surety Company*, 113 Md. 200,—said opinion being by stipulation made part of the Record. (R. 6, 43, 86, 192.)

C: In the fall of 1906, Mr. Schreiner, who was the foreign manager of the Munich, and who had been in Germany during the preceding summer,—returned to this country. For some reason or other, he was dissatisfied with the situation he found; and, on the first day of November, 1906, the Munich gave notice to the United rescinding the Contract (113 Md. 203; 225-6).

Fourth: It is somewhat important to grasp clearly the subsequent proceedings in the order of time (R. 117).

A: In May, 1907, the United brought suit at law against the Munich for the first year's accounting under the Contract; and later in the same month, the Munich filed a Bill in equity to enjoin this suit; and to have the Contract declared null and void on the ground that its execution had been induced through false and fraudulent misrepresentation. Strangely enough, the Bill admitted that the Munich had ratified its subscription at the meeting in August, 1906; but averred that the ratification did not include the Contract. To this Bill, the United filed its Answer, setting up ratifica-

tion, with full knowledge of all the facts; and by way of cross-relief, asked for an accounting under the Contract.

B: The Court dismissed the Munich's Bill; but retained the Cross-Bill for an accounting; and its action was affirmed by the Court of Appeals on May 6, 1910 (113 Md. at 202,—ABOUT SEVEN MONTHS BEFORE THE CONTRACT EXPIRED. During all of the intervening time the Munich had maintained the position that there was *no* contract between it and the United; but in December, 1909 (and before the decision of the Court of Appeals) it gave formal notice of its withdrawal under Article 12 of the Contract (R. 19), and one result of the Munich's repudiation was that the United, in its reports to the various State Insurance Commissioners, could not treat the Munich's liability as an asset.

C: On the nineteenth day of November, 1910, the parties entered into an agreement (R. 118-120) to facilitate the accounting ordered by the Circuit Court and affirmed by the Court of Appeals; on the succeeding eleventh day of January, 1911, the United went into the hands of receivers; and the Agreement of November 19th was carried on by them. After intervening proceedings unnecessary now to relate, the Circuit Court on January 2, 1913, ratified an Audit as of December 31st, 1910, awarding the receivers approximately $154,000; and on June 26, 1913, this decree was reversed in part by the Court of Appeals (*Munich Co. v. United Surety Co.*, 121 Md. 479) for the reason, principally, that the award included items of liability not then definitely ascertained (121 Md. at 493; R. 152-4). But the Court said:

> "The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the Agreement" (121 Md. at 496, end; R. p. 157, end).

D: After remand, there was a new audit giving the receivers approximately $77,000. This was ratified without objection; and the report of the auditor stated:

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D: After remand, there was a new audit giving the receivers approximately $77,000. This was ratified without objection; and the report of the auditor stated:

> "In accordance with the Opinion of the Court of Appeals of Maryland, this Account does not affect the amount properly payable by one contracting party to the other for the final period" (R. 158).

The Munich paid on October 2, 1913, and the receipt of the receivers, "under and in accordance with the Auditor's Report and Account," appears on page 165 of the Record.

E: On June 5, 1914, the receivers filed their petition for a final accounting (R. 120). The Munich resisted. It admitted that the final accounting provided for in the last paragraph of Article 13 of the Contract (R. 20) was yet to come; but it said that the Court was without jurisdiction in the pending case, because the decree therein only covered the *annual* accountings; and had been satisfied. The Circuit Court so held; and therein was affirmed by the Court of Appeals on June 24, 1915 (*Munich Co. v. Poe*, 126 Md. 520; R. 122). It was held that the final accounting would require new proceedings (126 Md. at 534), because in the former litigation:

> "The Court only had before it for review, the accounting for the five annual periods ending January 1, 1911. The audit before the Court did not include an accounting for a period after that time, and the Court did not pass on a settlement for any such period" (126 Md. at 527; R. 127).

Fifth: Thus the Munich escaped from a final accounting in the State Court. It had no agent in Maryland, and before proceedings elsewhere could be made effective, the War ensued and extended litigation followed between the Alien Property Custodian and the Trustees of the Munich, who resisted the sequestration of its property. The present suit was brought against the Alien Property Custodian after the property of the Munich was transferred and assigned to him.

No question affecting the Custodian, as such, is raised by the Appeal.

Sixth: In concluding this Outline of Facts, it will be helpful to clarify certain accounting provisions of the Contract.

A: The annual accounts were not, and could not, be final. Under the well recognized practice embodied in the laws of most of the States, so-called reserves are set up as liabilities in insurance accounting; and these are of two kinds. In the first place, there is the premium reserve for unexpired risks. Manifestly, since the premium is charged in advance, and is carried on the books as an asset, it becomes necessary to treat the unearned amount of this premium as a liability, in order to show the real result of the year's operations. At the close of the succeeding year, some or all of the unearned premiums (depending on the life of the bond) will become earned. To this extent, the liability of the former year will become an asset of the succeeding year and there will be a new premium reserve set up as a liability. Consequently, the premium reserve is listed as an item of disbursement in the United's annual accounts with the Munich (R. 17-18); and in each succeeding year, the past liability is credited as a receipt, in order to cover into the treasury so much as may have been fully earned. In the second place, there is a reserve for unadjusted claims,—an entirely different charge. A surety company does not pay all losses immediately on the happening of a default; but when a claim is made, there is a potential liability which must be included in any true statement of the business. Accordingly, an estimate is made of the probable loss and expense of adjustment; and the aggregate of such estimates constitutes the "claim reserve." Like the premium reserve, the claim reserve was to be charged as a disbursement in the United's annual account with the Munich (R. 17-18); and in the succeeding year credited as a receipt,—because all items in the prior claim

reserve would appear in the succeeding statement as items of losses paid or in a new claim reserve. And so with the item of "gross premiums." These were possible income only when charged on the books, because subject to actual collection or subsequent return, in case of cancellation. Manifestly, these annual statements were tentative and settlements based on them could not be final. Therefore, it was provided that within two years after the expiration of the Contract, accounts were to be made up showing the actual results of the *whole* business (Art. 13, R. 20). Inasmuch as the "premium reserve" only represents *unearned* premiums; and premiums on business written more than a year prior to this final accounting would then be fully earned,—this final account was not chargeable with the "premium reserve" (Contract, Art. 13). It would, however, show all the other items set forth in Article 8 (R. 17-18). If all claims pending on business written during the term of the Contract had not been adjusted, the "claim reserve" would still be maintained in the account; but as the actual losses might ultimately exceed or be less than the estimate,—the Contract further provided (Art. 13) that "after the final settlement of each of such claims, the Munich will be paid any difference in its favor and pay any difference in favor of the United."

THE CONCLUSIONS OF THE COURT BELOW.

By various stipulations in the District Court the parties agreed as to figures; and left open for discussion only the principles involved. There was argument on the main questions, namely: Whether there should be *any* accounting; and if so: Whether the Munich's obligation attached until the United's policyholders had been *actually paid*. Judge Rose disposed of these questions in a careful Opinion (R. 166). Next (again after argument) came a decree referring the

cause to a Special Master,—with instructions to be followed in stating the account (R. 172). The Master's Report was duly filed; and the Munich's exceptions thereto (R. 185) were argued. The learned Judge (as he said—R. 188) examined the evidence taken before the Master; and in another Opinion (R. 187) confirmed his Report. Thereupon came the final decree (R. 189), which was affirmed by the Circuit Court of Appeals.

THE MUNICH'S CONTENTIONS.

There are numerous assignments of error, but all of them have been reduced by the Appellant (Brief 7-8) to three propositions,—thereby eliminating from consideration much of the Record.

MUNICH'S FIRST CONTENTION: The Munich says that the receivers are barred from *any* recovery because there was an implied term in the Contract, namely: that the United would be successful; and that having disabled itself from carrying on business by going into the hands of receivers, it broke the Contract and cannot recover thereon. For this proposition the principle of "anticipatory breach" applied in *Central Trust Co. v. Chicago Auditorium*, 240 U. S. 581-91, is relied on. As Judge Rose shows (R. 169-70), the case is irrelevant. It decides that a Hotel Company has a provable claim in bankruptcy against a corporation which had contracted to furnish livery, drayage, etc., to the hotel and its patrons, which contract at the time of the bankruptcy of the Service Company had yet two years to run. The Trustee in Bankruptcy refused to assume and carry on the contract (pp. 587 and 590) and the Hotel Company was obliged to procure the service elsewhere for the unexpired term at increased cost, for which it was allowed a claim in bankruptcy.

The contract, in so far as the questions discussed are concerned, was executory (p. 589), and no question of the rights of the parties to adjust accounts for business done before the bankruptcy was involved. It was conceded that the Trustee might have assumed and carried out the contract (p. 590).

In the present case the Munich had given notice of termination of the relationship and the period of notice expired before the receivership, so that the right to bind the Munich on new business had expired, and nothing remained but to determine the rights of the parties as to risks already assumed; in other words, a liquidation of the business and an accounting under the agreement; a situation in direct contrast to the executory contract treated in the Auditorium case.

Moreover,

A: The Munich is not in a position to rely upon any such defense.

All of the accounting procedure and litigation in the State Courts took place *after* the receivers were appointed. The Munich uniformly admitted its liability to a final accounting, such as is being asked for here, and the Maryland Court of Appeals, in Munich Re-Insurance Company vs. United Surety Company and Receivers of the United Surety Company (121 Md. 479, 496), in which it reversed the decision of the lower Court on the Munich's appeal, concluded its opinion with the following statement:

> "The Munich Company, however, is concededly responsible for its due proportion of all losses which may eventually develop from the insurance covered by the agreement." (R. 157.)

This was in June, 1913, two and a half years after the receivers were appointed. And in the later case (126 Md. 531), in which the Munich successfully objected to the jurisdiction of the Maryland Court to compel a further accounting under the decree that had been entered in that case

(R. 121), the same concession (that a final accounting was to come), is repeated (R. 122 and 131, top). It is this final accounting that the Munich is attempting now to entirely defeat by this defense. Clearly this defense is an afterthought and not available even if under any conditions sufficient. It is difficult to see the force of the Munich's contention to the contrary. (Brief, p. 20.)

B: Again: the very object of the Contract was to protect the United's stockholders against one-third of the losses if the venture *should* prove *unsuccessful*. Why else should the Munich receive one-third of the profits in case of success? The Contract provided for the *Munich's* right to retire, after the first term (R. 19) "if the transactions under this Agreement result in a loss" to it. But the Court is now asked to write in *another* provision, namely: that if in any year, the losses prove so great as to impair the capital and thereby stop the business,—then the Munich may walk away with previous profits, if any, and leave the United without any claim on it. An umbrella for fair weather only.

C: Least of all can such contention come from the Munich. Wrongfully (as the Court of Appeals decided) it repudiated the Contract in the first year of the five-year term, and maintained this attitude until a few months before the receivers were appointed. Never, during the contract period, did the Munich pay a dollar of its contract liability to the United. A different course, as the witness Clark said (R. 55), would have prevented any receivership; and there is force in his statement (R. 56) that if the Munich had admitted its liability for its one-third of the losses, there would have been no insolvency from the insurance point of view. *Certainly, a "joint adventurer"* (Appellants' Brief, p. 27) *whose wrongful desertion cripples the ship can hardly complain of the lost voyage. Nor can the doctrine of "anticipatory breach" be invoked by one who wrongfully repudiates during the other party's performance.*

D: Much the same confusion appears in the stress put by the Munich's learned counsel on the fact that when the receivers were appointed, and for some time afterwards, the United claimed to be solvent; and was so treated by the State courts. The argument apparently is: that since the United was solvent, the receivership was a wrong to the Munich. In the first place, it must be remembered that the test of solvency under the Maryland law (differing herein from the test in bankruptcy) is the ability to pay your debts in the ordinary course of business; and this explains the United's successful opposition to the Bill of Preston (R. 86). In the second place (as Judge Rose says—R. 170), when a surety company, however solvent, stops doing new business because of impaired capital, it must either reinsure or go from bad to worse. Certainly, as the sequel showed, the Court of Appeals made a mistake in reversing the Order of Judge Heuisler (R. 69, 120 Md. 91), under which the receivership would have terminated years ago. But *what* difference can it possibly make *in the issue here,* whether the United was or was not technically solvent when the receivers were appointed? It had been stopped from further business by the Insurance Commissioner of its own State (R. 106). The wrongfully repudiated Munich Contract had expired; the United's stockholders stood to lose two dollars for every dollar of loss to the Munich; and as Judge Rose says (R. 170):

> "In that state of things, all that the Munich could justly require was that the United should, in good faith, exercise reasonable care to wind up its business to the best advantage, and that, so far as the Record discloses, is precisely what the receivers did."

Surely this is good sense; and it is also an answer to the Munich's complaint, that there were some seventy millions of business on the United's books when the receivers took

possession; and that if this business had been allowed to run out, the premiums would have become earned and much loss saved. But how was this possible? The best classes of bonds were cancelled by their owners. The Company's agents in the various States; its office and field forces, its adjusters,—were no longer available; the effort of the receivers to cancel the risks was the obviously wise thing for both parties; and it is significant that the Record nowhere shows any protest or objection by the Munich,—until years afterwards and in this case. As the Court of Appeals of Maryland has recently said:

> "There is other evidence tending to show that the receivers, as well as the learned Judge who had charge of the receivership, took active and *proper* (italics supplied) precautions to advise parties interested of what they believed to be the real condition of the United Company, and to show that they were desirous of having it relieved of future liability by thus obtaining new sureties and relieving the United Company"—*Barber Asphalt Co. v. Poe*, 139 Md. at 339.

The Munich's Second Contention: The next proposition of Munich is that (assuming its liability to account) the Court erred in construing the Contract (Brief, p. 23). The argument here is divided into two parts.

I: It is said (Brief, p. 24) that if the Contract is one of re-insurance, then the Munich was entitled to 1/3 of all premiums charged by the United whether collected or not. The discourse here (with respect) seems merely didactic; and is quite irrelevant to the Contract between the parties. The Munich's interest was in the net gains or losses (Article 9: R. 18) based (Article 8: R. 17) on *income* and disbursements.

II: It is contended, however, that the Contract is *not* a *re-insurance* contract; and *therefore* the Munich's obligation arises only when (and is limited by what) the United pays to its creditors; and (it is argued) "since none of the claims against the United which form the basis of the accounting herein have been paid, the judgment and decree of the Court below should be reversed and the Bill ordered dismissed and prematurely brought" (Brief, p. 30). In view of this statement and that on appellant's brief, page 16, it is well to state that in addition to the $57,000 (R. 77) paid to creditors prior to the hearing, all preference claims against the receivership, amounting to approximately $70,000, have been paid and a general distribution to creditors of twenty per cent. has been made. CONCERNING THIS CONTENTION OF THE MUNICH IT IS SUBMITTED FURTHER:

A: The second position, namely: that the Contract is *not* a re-insurance contract, was adopted, necessarily, to take the case out of the decisions in *Allemannia Fire Ins. Co. v. Firemen's Ins. Co.*, 209 U. S. 326, 332; and *Consolidated Real Estate Co. v. Cashow*, 41 Md. 59, 74. These cases settle the point that where the contract contains the element of indemnity, the liability of the re-insurer "is not affected by the insolvency of the insured or by its inability to fulfil its own contract with the original insured." In the Contract at bar, of course, the element of indemnity is distinctly present; and the practical difference between it and a conventional re-insurance is, that the Munich took its pay, not in the shape of a premium, but through a participation in profits and losses.

The question, however, is not one of labels. The obvious intent of the contract at bar was that precisely noted by this Court in the *Allemannia case* (209 U. S. at 334): "The original company may have re-insured for the purpose for which re-insurance is usually, if not universally, accomplished,—for the purpose of supplying itself with a fund with

which to meet its obligations." And the same case shows that even where the reinsurer's contract is to pay "at the same time and pro rata with the insured," "such language simply gives to the Company the benefit of any defense, deduction or equity which the first insurer may have, making the liability of the re-insurer the same as the original insurer. It does not limit such liability to what the original insurer may have paid or be able to pay" (209 U. S. at 333).

B: The principles above announced are (we submit) plainly applicable to the contract here involved; and whether you call it one of re-insurance or of participation is of little moment. The fallacy of the appellant's learned counsel lies in confusing the modal and administrative provisions for the periodic settlements (which are necessarily stated in terms of the United's receipts and *payments*) with the Munich's ultimate liability. The Munich does *not* agree to pay the United one-third of any dividend that its creditors may have received in liquidation out of the United's estate if the joint venture fails. It *does* agree (whether the United succeeds or fails) to pay one-third of the *losses* resulting from the joint venture. The United cedes and it accepts "one-third share of the amount insured under every bond policy or guarantee" of the classes named; the Munich "assumes" one-half of the United's "liability" "in each and every case" (Art. 1, R. 14) on all of the joint business. The Munich's "liability" coincides with the United's (Art. 2; R. 15) throughout its whole extent. If the Munich exercises its right of withdrawal, it remains "liable" for losses growing out of unfinished business (Art. 12; R. 19). Surely in vain do the Munich's learned counsel attempt to convert a *liability* for *losses* incurred under the insurance policies into an obligation measured by the United's solvency.

C: Furthermore, the Munich's contention lacks both fairness and plausibility. As Judge Rose said (R. 170-71):

> "The Munich was to pay one-half of the net liability retained by the United. There was no limitation as to

the amount for which it might become bound. When the contract was made, it was quite possible that the obligations which in five years the United might assume, would ultimately entail a liability exceeding its capital and surplus. In that event, it would have to close its doors and liquidate its business, and if it did, according to the Munich's present contention, the latter would be discharged, that is to say, if the United's losses were very great, the Munich would be released from obligation to pay any of them. Such a claim is its own best answer."

If (for illustration) the stockholders of the United were under a statutory extra-liability to its creditors, and if some catastrophe had wiped out its assets, then, under the Munich's contention, it would go scot-free, leaving the United's stockholders to bear the whole burden.

THE MUNICH'S THIRD CONTENTION.

Finally, the Munich says that even if (1) the doctrine of anticipatory breach, as applied in the Auditorium case (Brief p. 16) is not applicable here; and even if (2) it is *now* bound to contribute one-third of the ascertained losses growing out of the joint business,—regardless of the United's insolvency;—nevertheless the decree is excessive by one-third of $125,000, or approximately $42,000 (Brief 31, 34). Here again (it is with respect submitted) the learned counsel are confusing words and things.

A: The five years of the contract began with 1906 and expired with 1910. The decision holding the Munich's repudiation of November 1, 1906, wrongful, was not rendered until May, 1910 (113 Md. 202). The Receivers were appointed in February, 1911. In the interval between the decision and the appointment of the Receivers, namely: in November, 1910, the Munich and the United entered into an accounting agreement (R. 118) whereby the American Audit Company

was to state (from the books of the United) "an account in annual periods beginning January 2, 1906, and ending on January 1, 1911, applying to the share of the Munich Re-Insurance Company in the business of the United Surety Company as per their contract above referred to" (R. 118). The Agreement further provided (R. 119) that "the audit shall not extend to outstanding liabilities for unexpired risks or claims not yet settled; both the outstanding liabilities for unexpired risks and claims not yet settled are reserved for future adjustment between the parties under the terms of the contract." The United's Receivers and the Munich's co-operated in this audit; and it was the basis of the money decree affirmed in part and reversed in part by the Court of Appeals (121 Md. 479; R. 142) in June, 1913.

B: The audit which was before the Court of Appeals (R. 146, top) necessarily showed under Income for 1910, the gross premiums *booked* during the year (R. 17); and obviously, there must have been on December 31, 1910, some premiums treated as income which subsequently proved uncollectible. All of them, moreover, were subject to return by the United (as to the unearned portion) if in the ensuing year either party cancelled the policy. Of course, during the running of the contract, this made no difference, because while the *annual* settlement was on the basis of gross premiums as *charged*, those subsequently returned were allowed as a disbursement in the next year's statement (R. 17).

C: In the audit for 1910, therefore, the Munich was credited with the gross premiums on joint business as charged on the United's books (and whether collected or not), namely, about $454,000 (R. 150). But subsequently, the Receivers (because of cancellations or inability to collect) wrote off approximately $167,000 of premiums appearing as assets; and about 75% of this amount (Brief, p. 34) or $125,000 was part of the $454,000 appearing as Income in the 1910 audit. The Munich (Brief, 34-35) does not, in this connection, ques-

tion the "propriety" of this action by the Receivers; but it says that the tentative credit of $454,000 as gross premiums in the 1910 audit may not now be reduced to the actual figures,—because certain expressions of the Maryland Court of Appeals make the question *res judicata* (Brief, 43).

D: The answer lies in the fact that Judge Urner, who delivered the Opinion in 121 Md. 479 (R. 142), fell into the error of assuming that the Account before the Court was the *final* account provided for by the contract. It was overlooked that, although the date of the audit was more than two years after the expiration of the contract, the actual figures were, nevertheless, *as of* December 31, 1910,—the expiration date. It was said (R. 149) "the present accounting must accordingly include the annual ascertainments of profit and loss required to be made during the currency of the contract *and also the settlement for which it provides after the expiration of the notice of withdrawal*" (Italics supplied.)

E: The error was corrected in the later case reported in 126 Md. (R. 121) which discharged the Munich from the proceeding in the State Court. It was there said (R. 127): (a) that the Court in the earlier case did not mean the settlement "to include the two years after 1910"; (b) that in the earlier case "The Court only had before it for review the accounting for the five annual periods ending January 1, 1911. The audit before the Court did not include an accounting for a period after that time, and the Court did not pass on a settlement for any such period." And (c) that there *only* were three questions disposed of by the auditor's report before the Court in the earlier case. NONE OF THE THREE (R. 128, top) INVOLVED THE RIGHT OF THE UNITED, IN THE FINAL ACCOUNTING, TO REDUCE TO ACTUAL FIGURES THE TENTATIVE CREDIT ALLOWED FOR GROSS PREMIUMS IN THE AUDIT FOR 1910. Nor was this question raised or discussed in any Opinion.

F: The Munich's learned counsel (Brief, 42) furthermore abstracts from the Opinion in the later case one expression, namely (R. 133): "the only items left open after the decision in 121 Md., are the reserve for claims and the ultimate liability of the Munich Company with respect to obligations issued by the United Company which were covered by the Participation Agreement 'as to which the defaults are not now but may hereafter be disclosed' to use the language of that Opinion." But when Judge Boyd was speaking of the "only items left open," by Judge Urner's decision, he was obviously thinking of the questions raised in the earlier case, and with which Judge Urner had dealt. There was no discernible reason why the tentative "gross premiums" item should have been treated as final; nobody so thought or contended; and it seems strange to invoke the doctrine of *res judicata* for a question not in issue or under discussion; and which arose from events occurring after the date of the audit which was before the Court. Judge Rose deals with this question in his Second Opinion (R. 188); and (it is believed) unanswerably.

The Decree should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 34.—October Term, 1925.

Frederick C. Hicks, Alien Property Custodian, et al., Appellants, *vs.* Edwin W. Poe, et al.	Appeal from the United States Circuit Court of Appeals for the Fourth Circuit.

[November 16, 1925.]

Mr. Justice Brandeis delivered the opinion of the Court.

This suit for an accounting was begun in the federal district court for Maryland on June 12, 1920, by the receivers of the United Surety Company, a corporation of that State, against the Munich Re-Insurance Company, a Bavarian corporation. The controversy arose out of a written agreement entered into by the companies in 1906. There had been active litigation in the Maryland courts where much became *res judicata*. See *Munich Re-Insurance Co.* v. *United Surety Co.*, 113 Md. 200; 121 Md. 479; *Poe* v. *Munich Re-Insurance Co.*, 126 Md. 520. This suit was then begun under § 9 of the Trading with the Enemy Act, October 6, 1917, c. 106, 40 Stat. 411, 419 as amended, because the receivers sought to reach funds of the Munich Company in the possession of the Alien Property Custodian. The District Court after careful opinions entered a decree for the receivers for $189,517.16 with interest. 276 Fed. 949; 293 Fed. 764. The Court of Appeals affirmed it without opinion. 293 Fed. 766. The appeal to this court, allowed January 7, 1924, was taken as of right under § 241 of the Judicial Code. We find no reversible error. Two matters only require mention. Neither presents a question federal in its nature.

The United engaged in the business known as surety, fidelity and burglary insurance. The Munich, by what is called a participation contract, agreed with it to assume one-third of the liability on every such risk written during a period of five years. The management of the business was to be left to the United without restriction. Upon an annual accounting the Munich was to receive one-third of any profits or pay one-third of any losses. A decree entered against the Munich in the state court for losses incurred

during the five-year period had been satisfied. This suit is for losses incurred after its expiration on insurance of the United then still outstanding. The company had been unsuccessful. The state court after the expiration of the five-year period appointed receivers who proceeded to wind up the business. They sought in vain to re-insure all outstanding risks. Then, with the approval of the court, they secured, so far as possible, cancellation of the outstanding insurance by returning unearned premiums. The losses on account of which this suit was brought were on risks entered into during the existence of the participation contract and remaining unexpired upon its termination and which the receivers did not succeed in getting cancelled. The Munich argues that by the course pursued the assets were wasted through returning the unearned premiums on good risks, and that thus the poor risks were left unprotected; insists that it was entitled to have all the insurance carried to its expiry; and contends that the receivers, by securing the cancellation of much of it for the purpose of winding up the business, committed a breach of the participation contract which released it from further liability. The contention is unfounded. The participation contract did not restrict the discretion to be exercised by the United, and its receivers, in the conduct of the business or in winding it up after the termination of the agreement. The case of *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, upon which appellants rely, is without application.

There is a further contention that, because the United has not paid to its creditors any part of the amounts due on its contracts, and is likely to pay only twenty-five cents on the dollar, the Munich is under no liability to pay to it anything on account of losses incurred thereunder or, in any event, more than a *pro rata* share of the payments actually made by the United. The Munich became a re-insurer. The liability of a re-insurer is not affected by the insolvency of the re-insured company or the inability of the latter to fulfil its own contracts with the original insured. *Allemania Fire Insurance Co.* v. *Firemen's Insurance Co.*, 209 U. S. 326. The participation contract differs from customary re-insurance in this. The Munich instead of receiving premiums and paying its share of losses was to participate in profits and losses. The difference is not one which affected the scope or character of the Munich's obligation.

Affirmed.